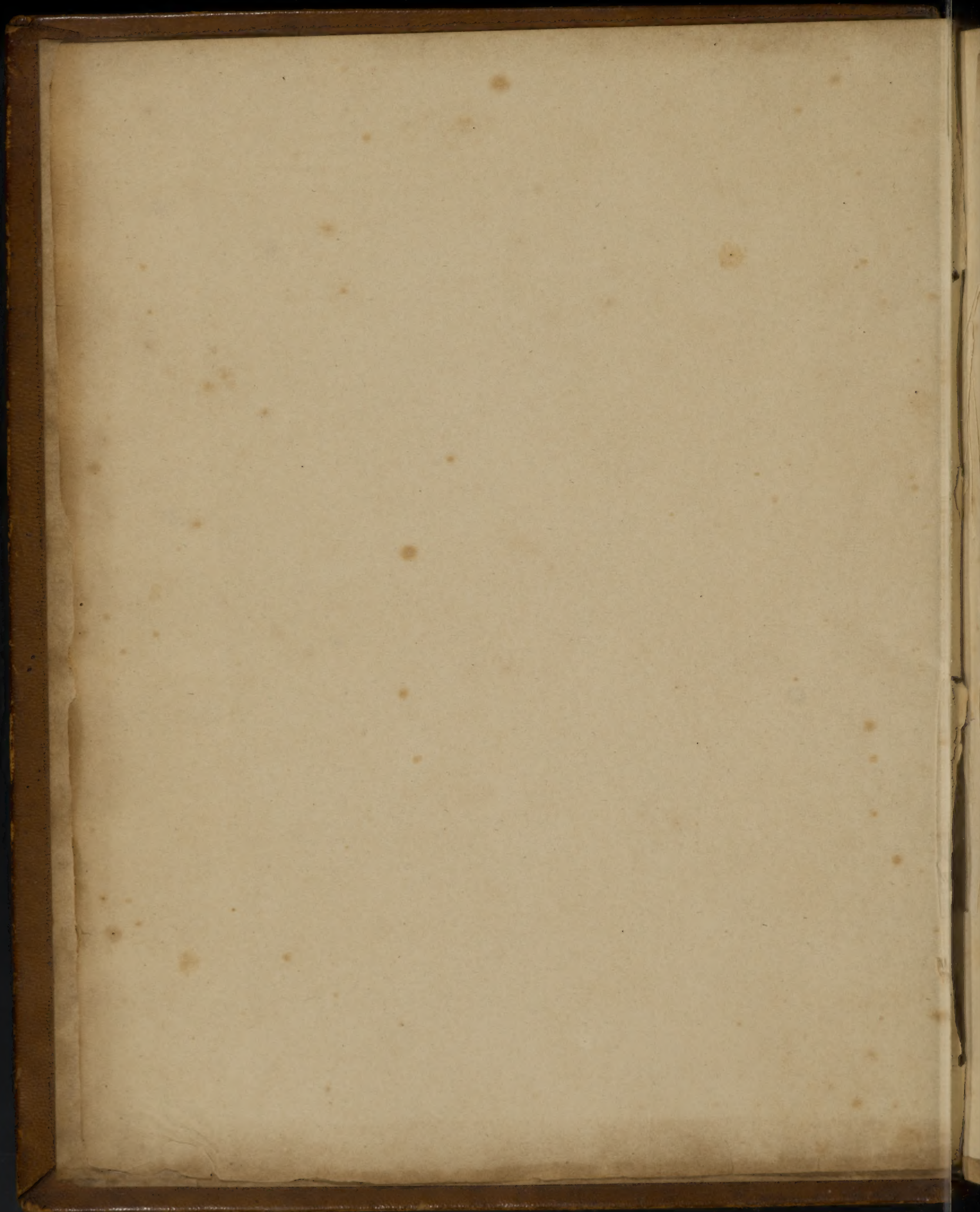
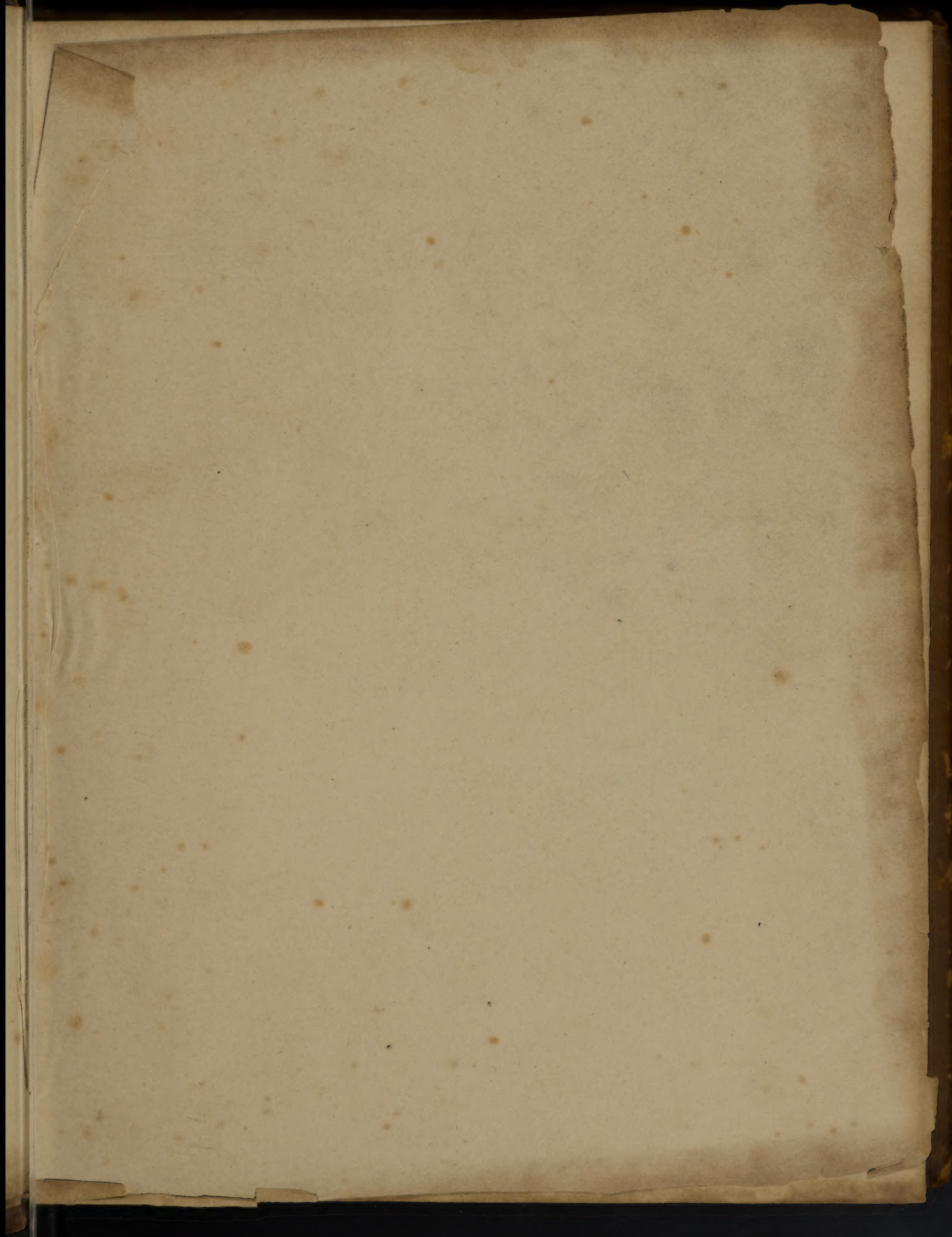


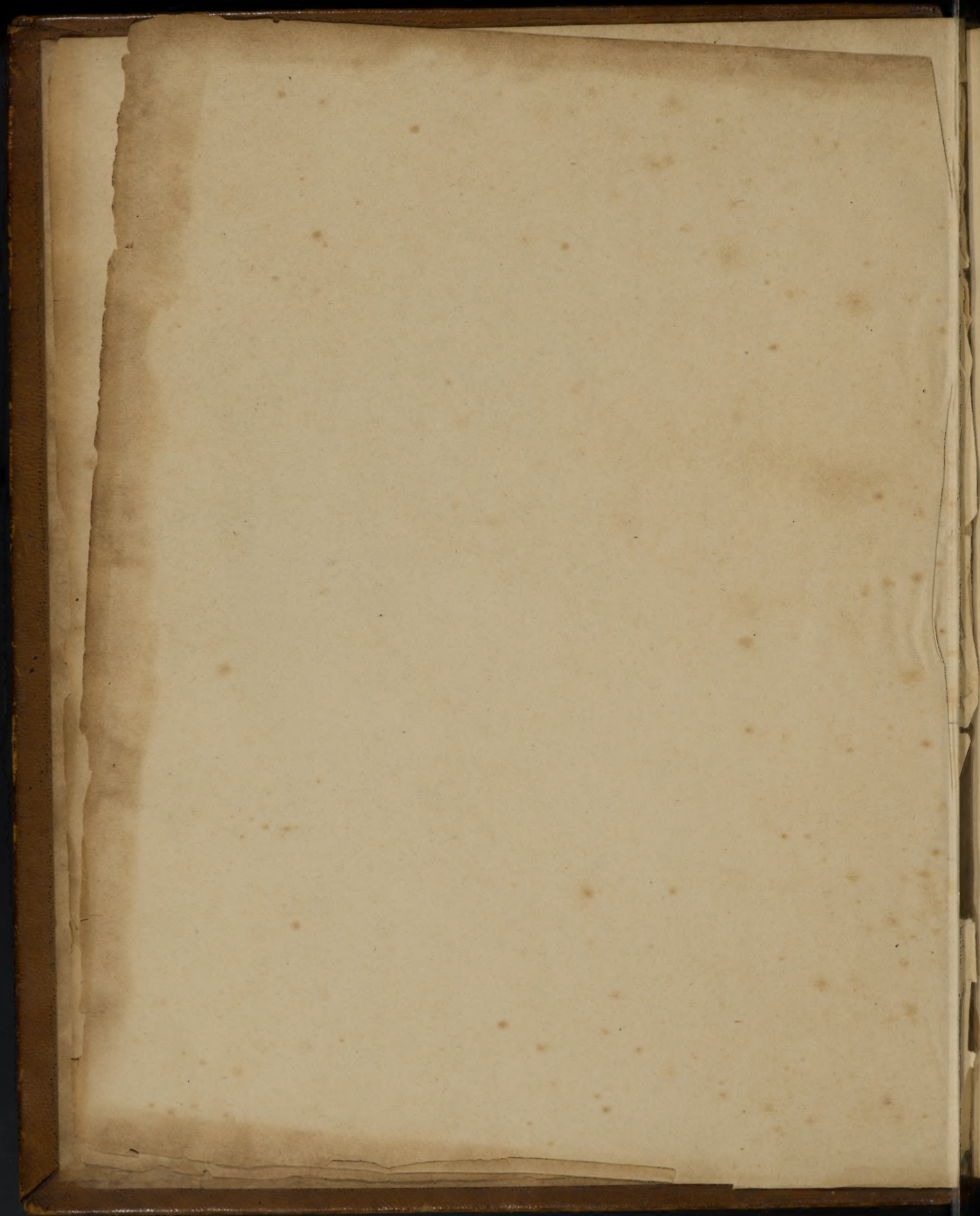
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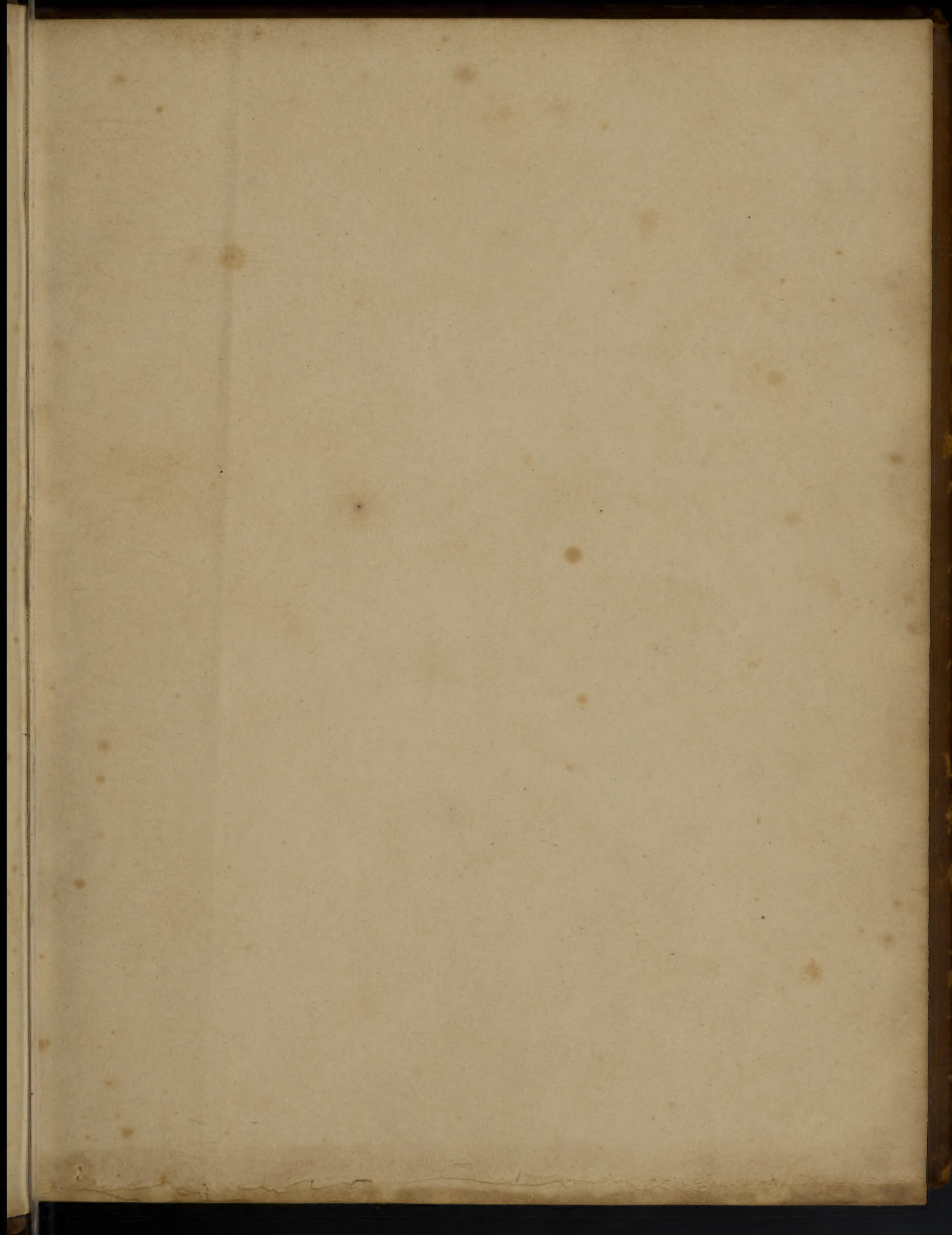
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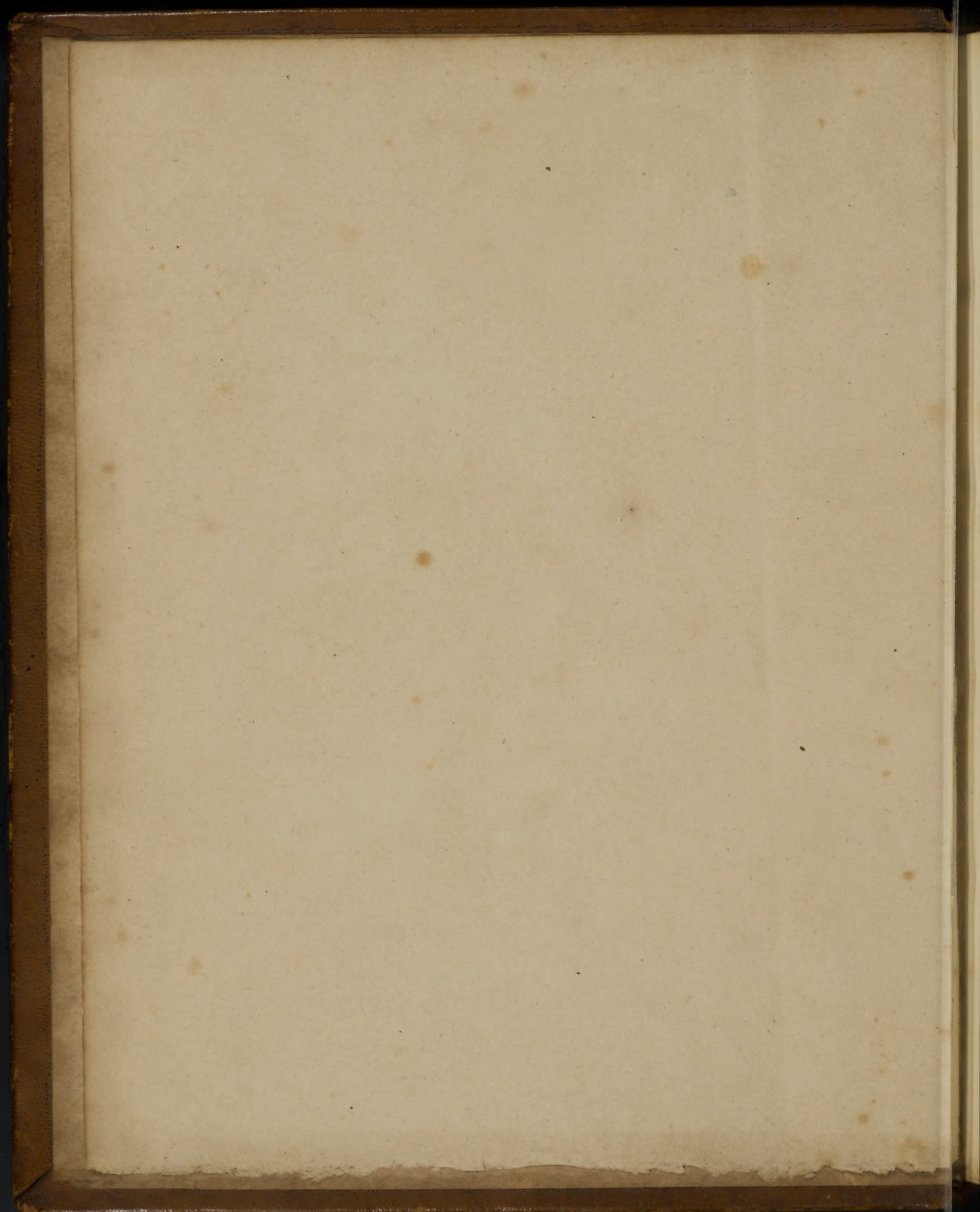
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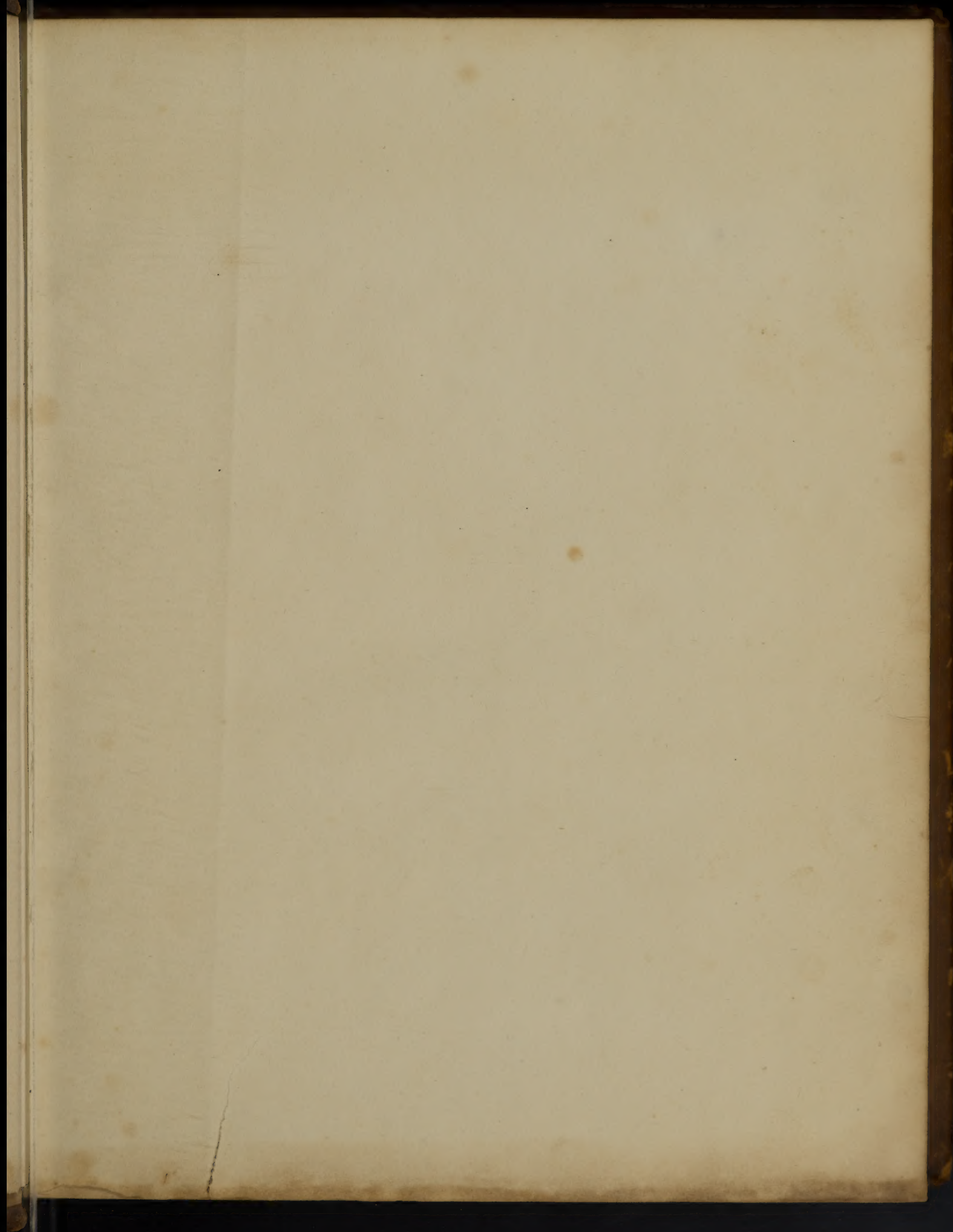


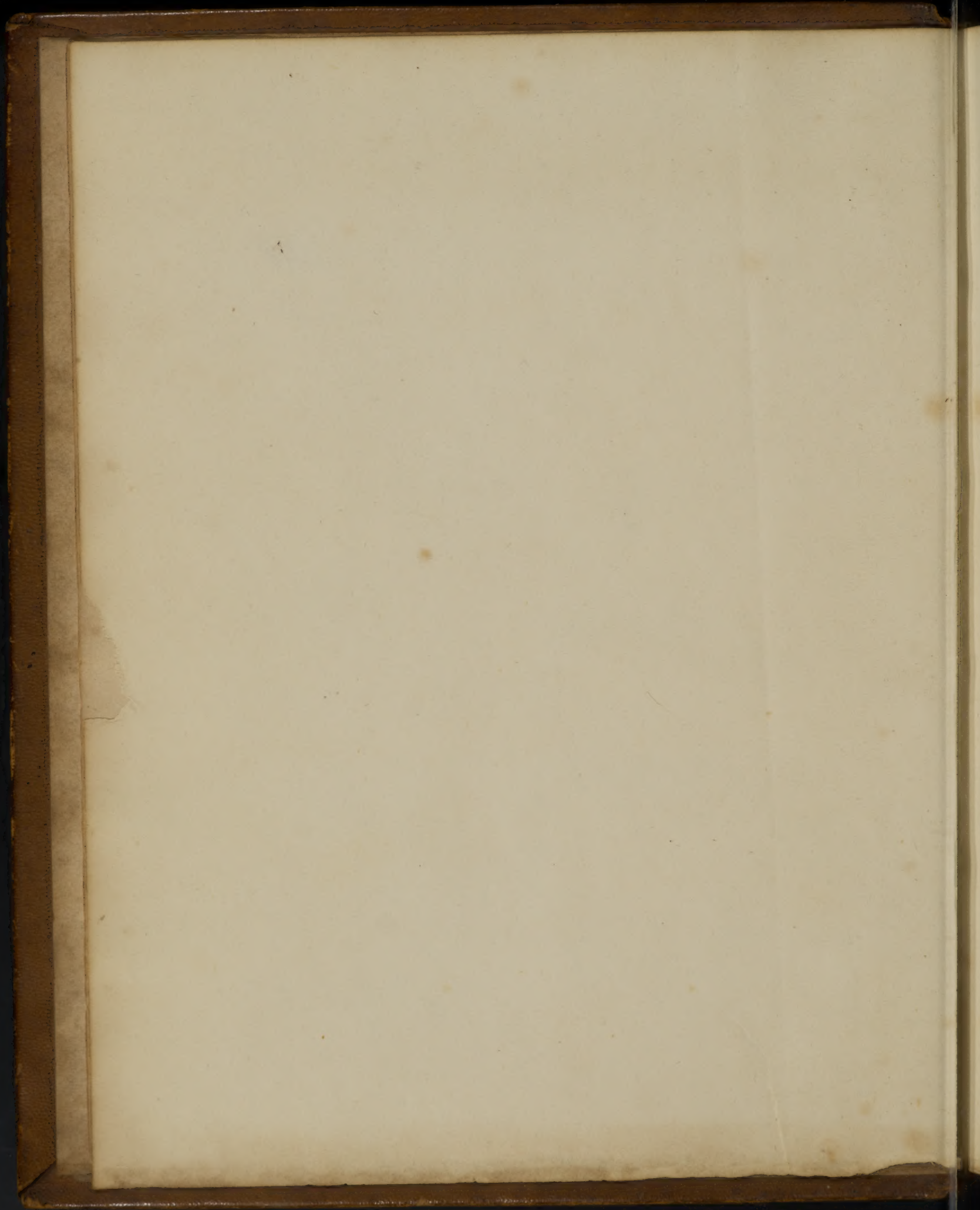


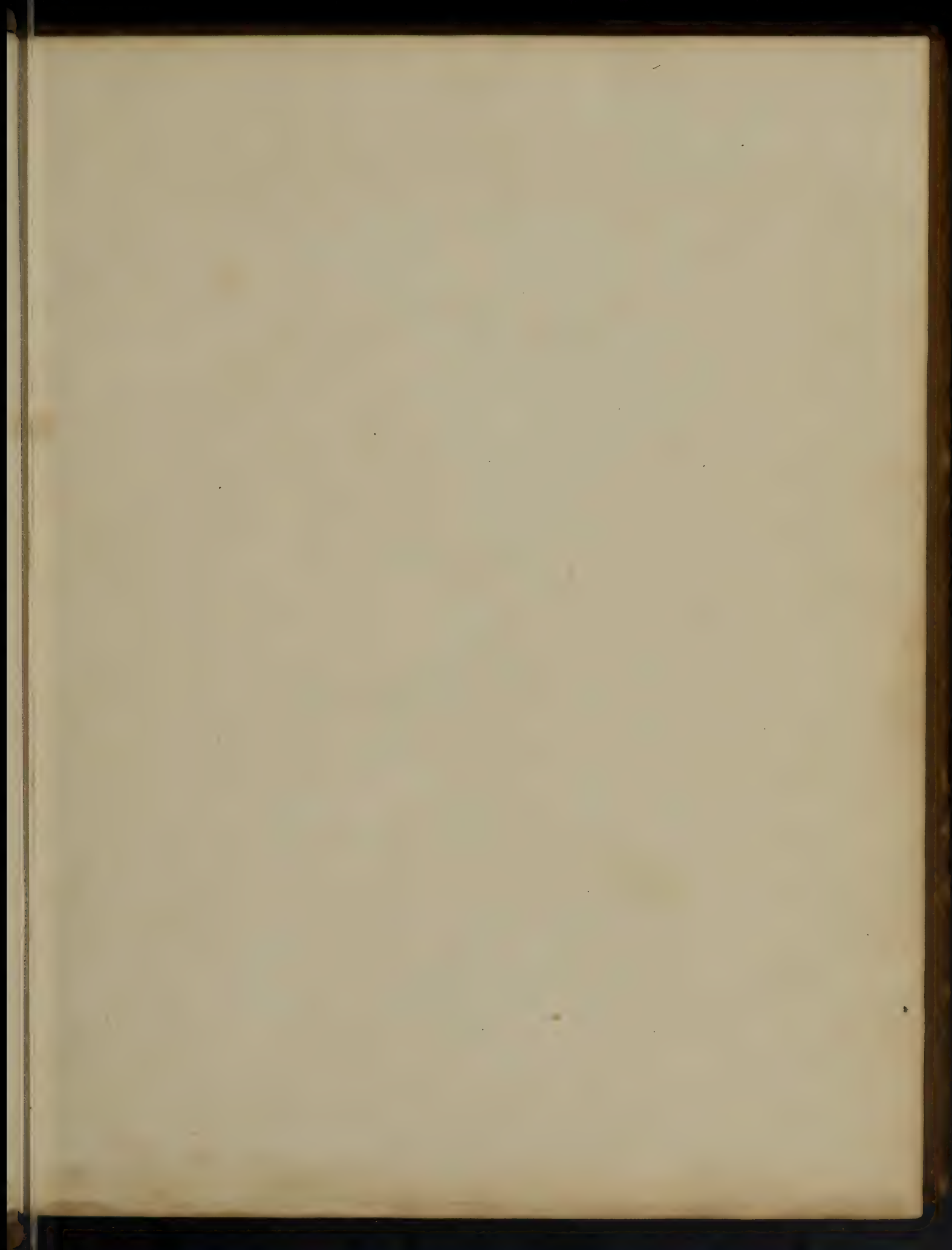


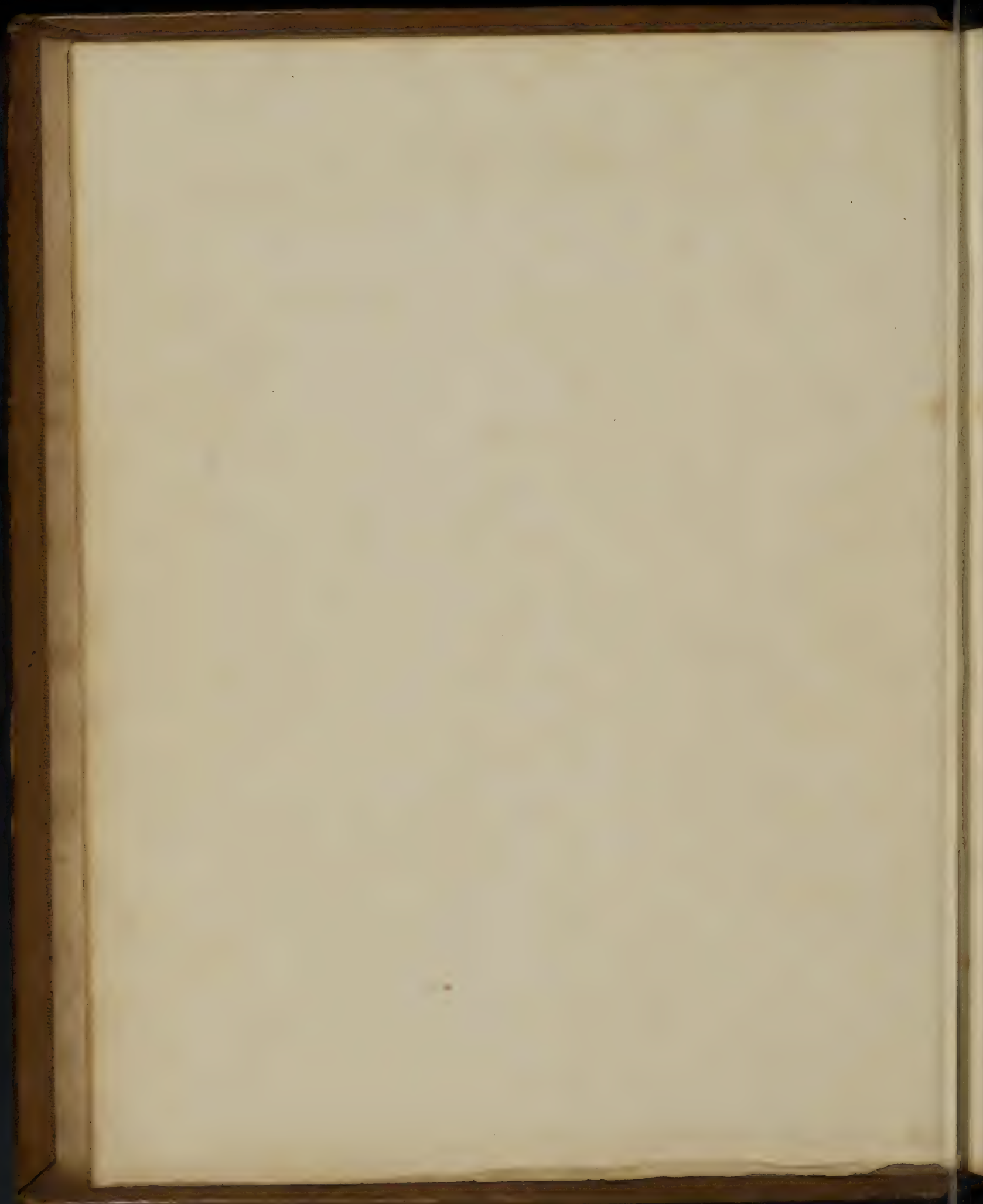


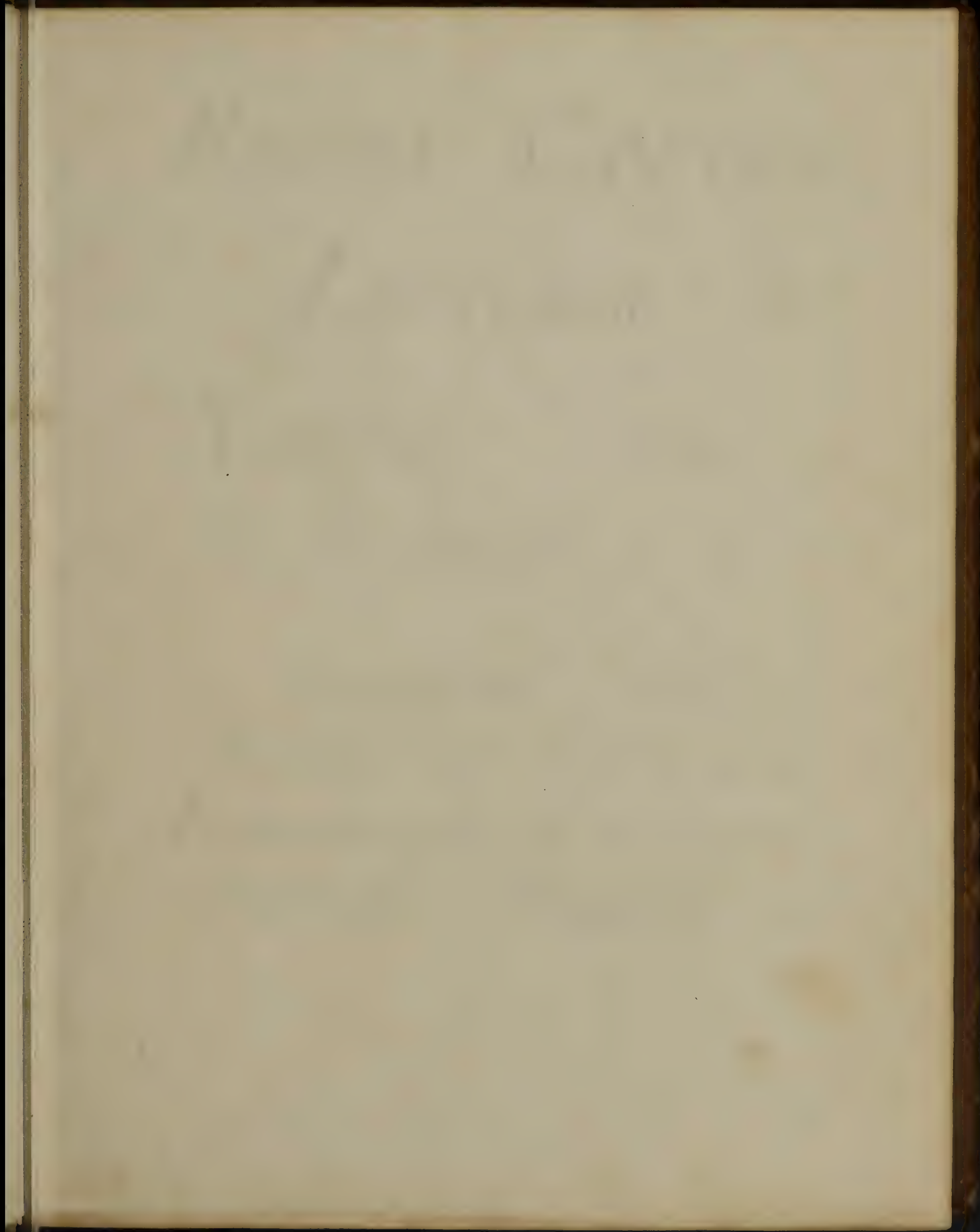


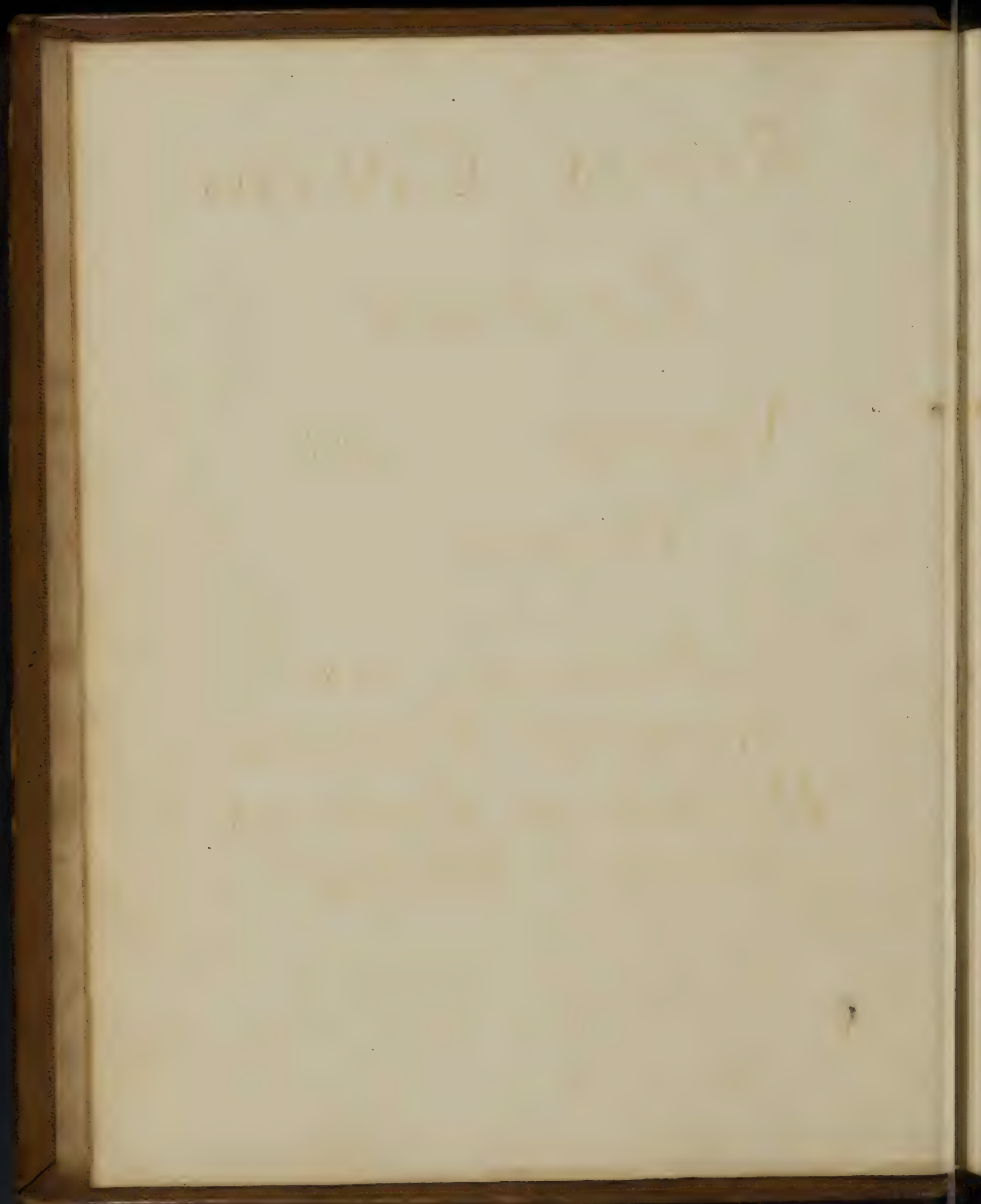












REEVES GOULDS

LECTURES

VOLUME III

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BAILMENTS . ALSO

ACTIONS ON CONTRACTS

DEFENCES TO CONTRACTS

PRIVATE WRONGS

James C. 1850

James C.

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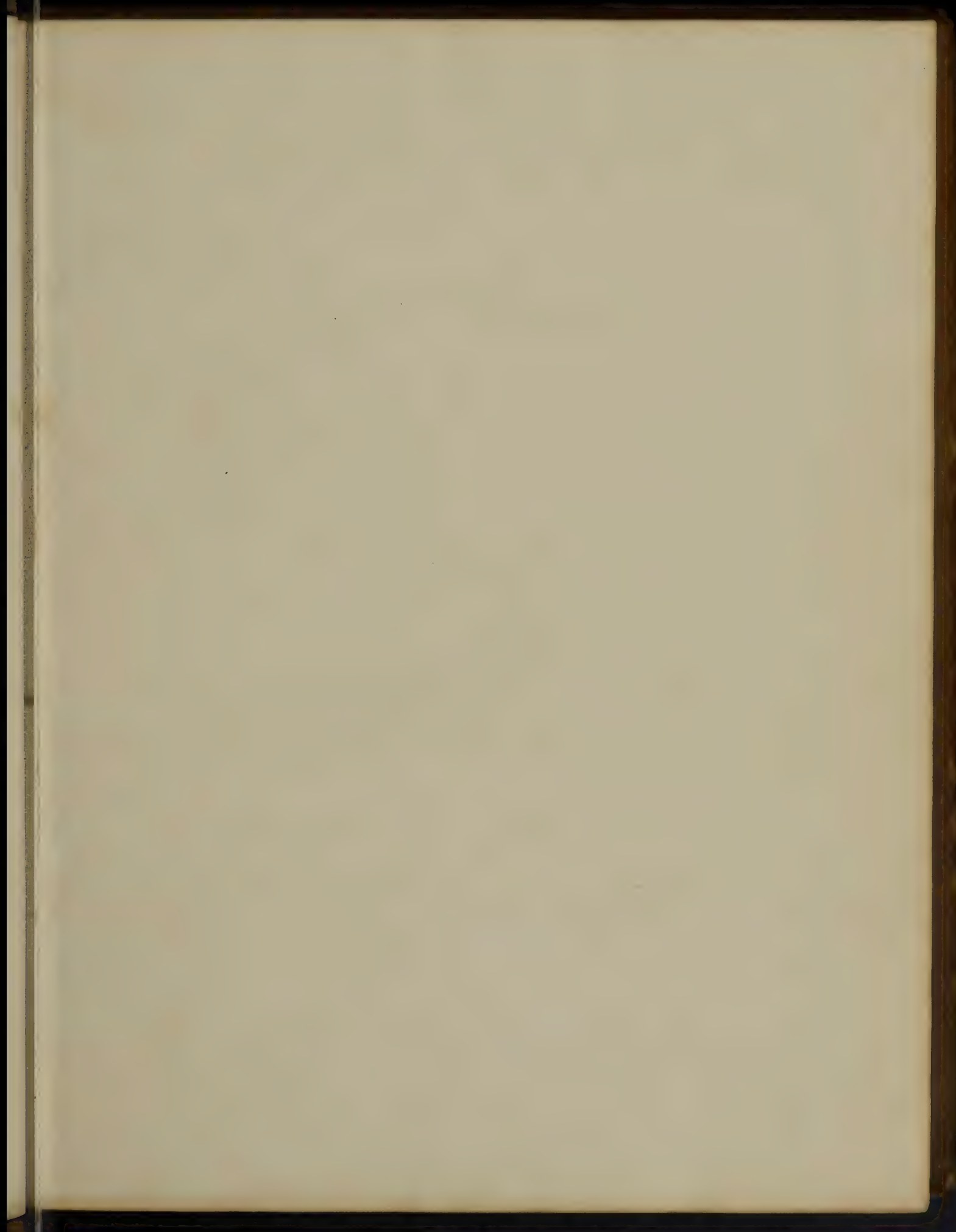
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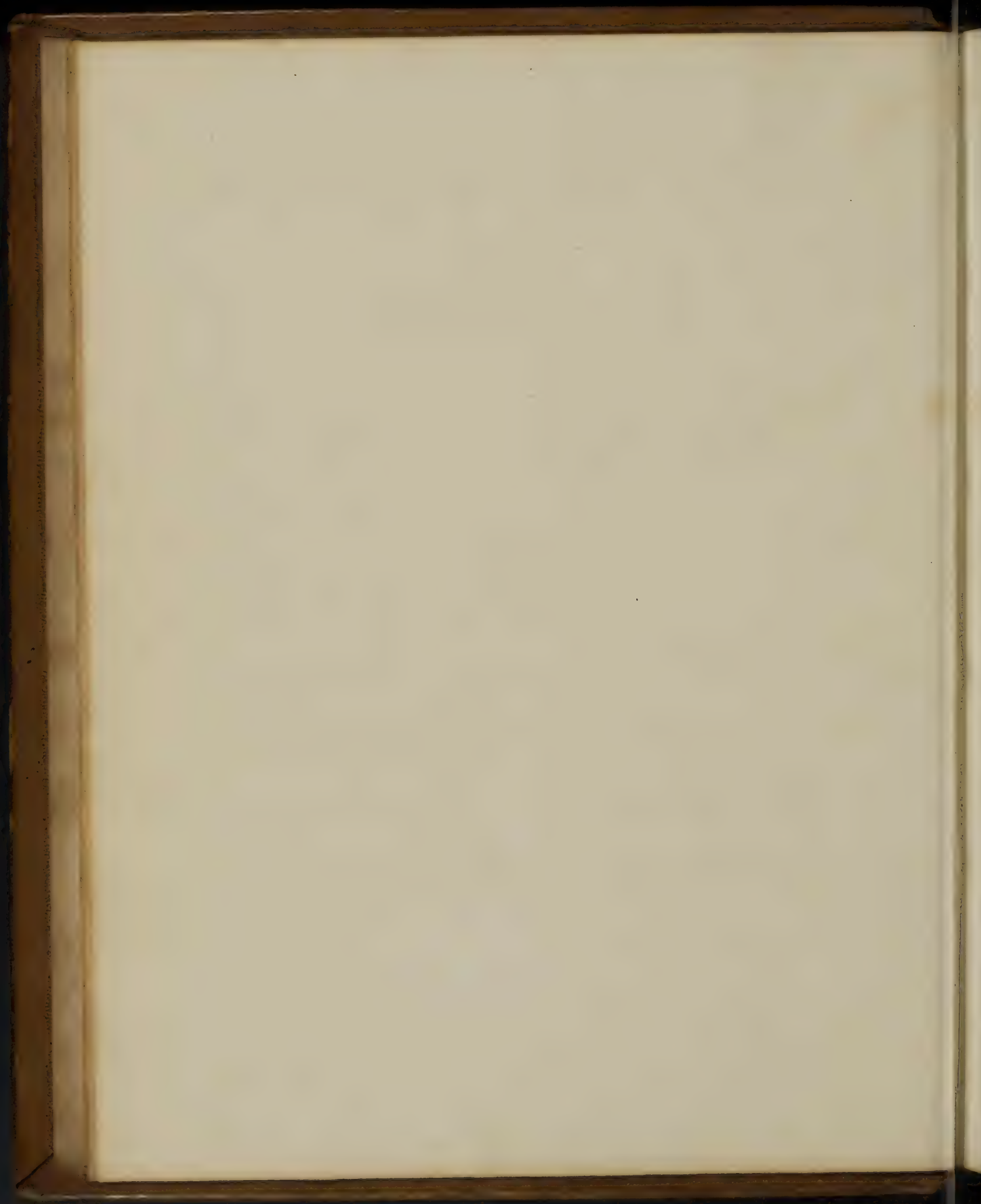
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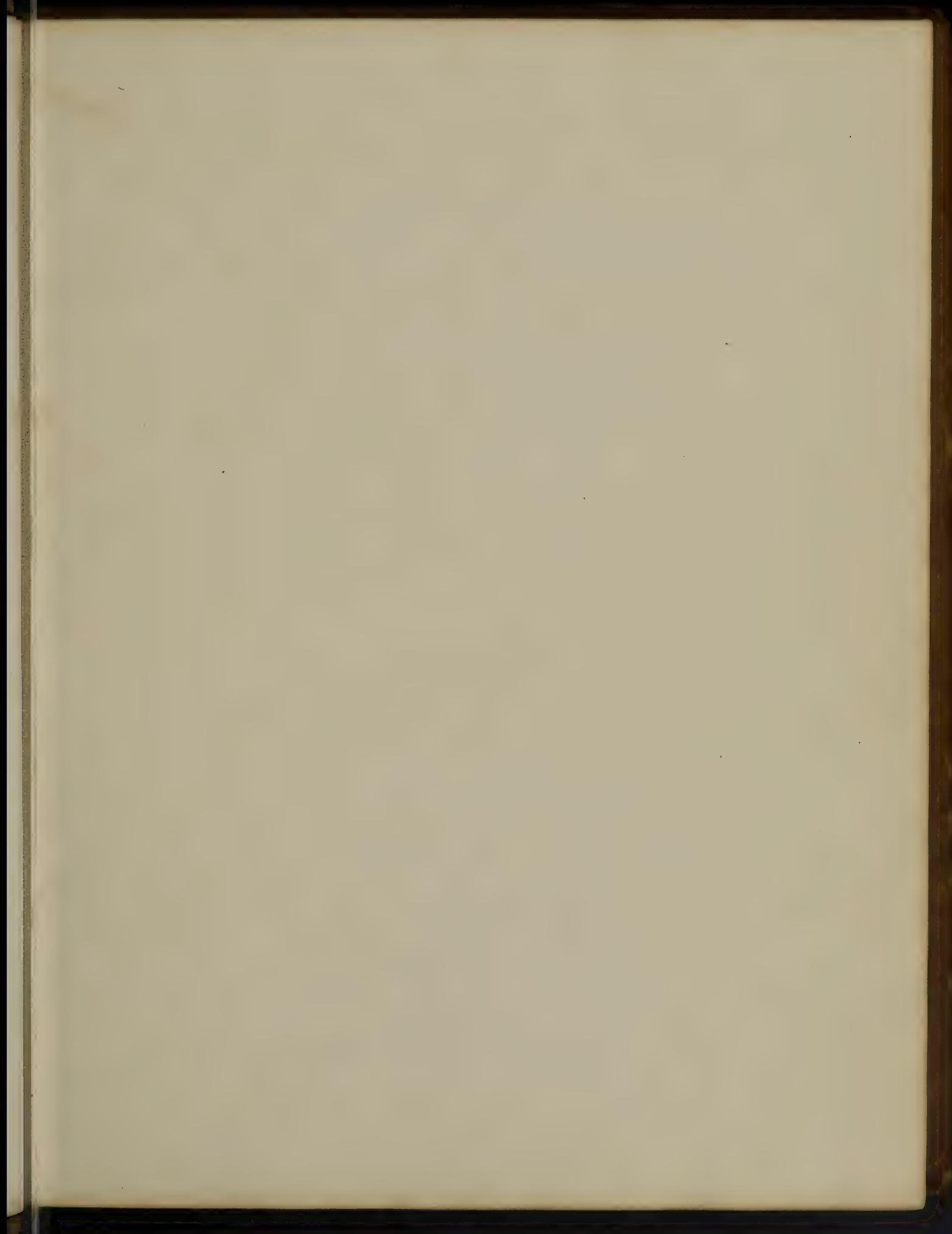
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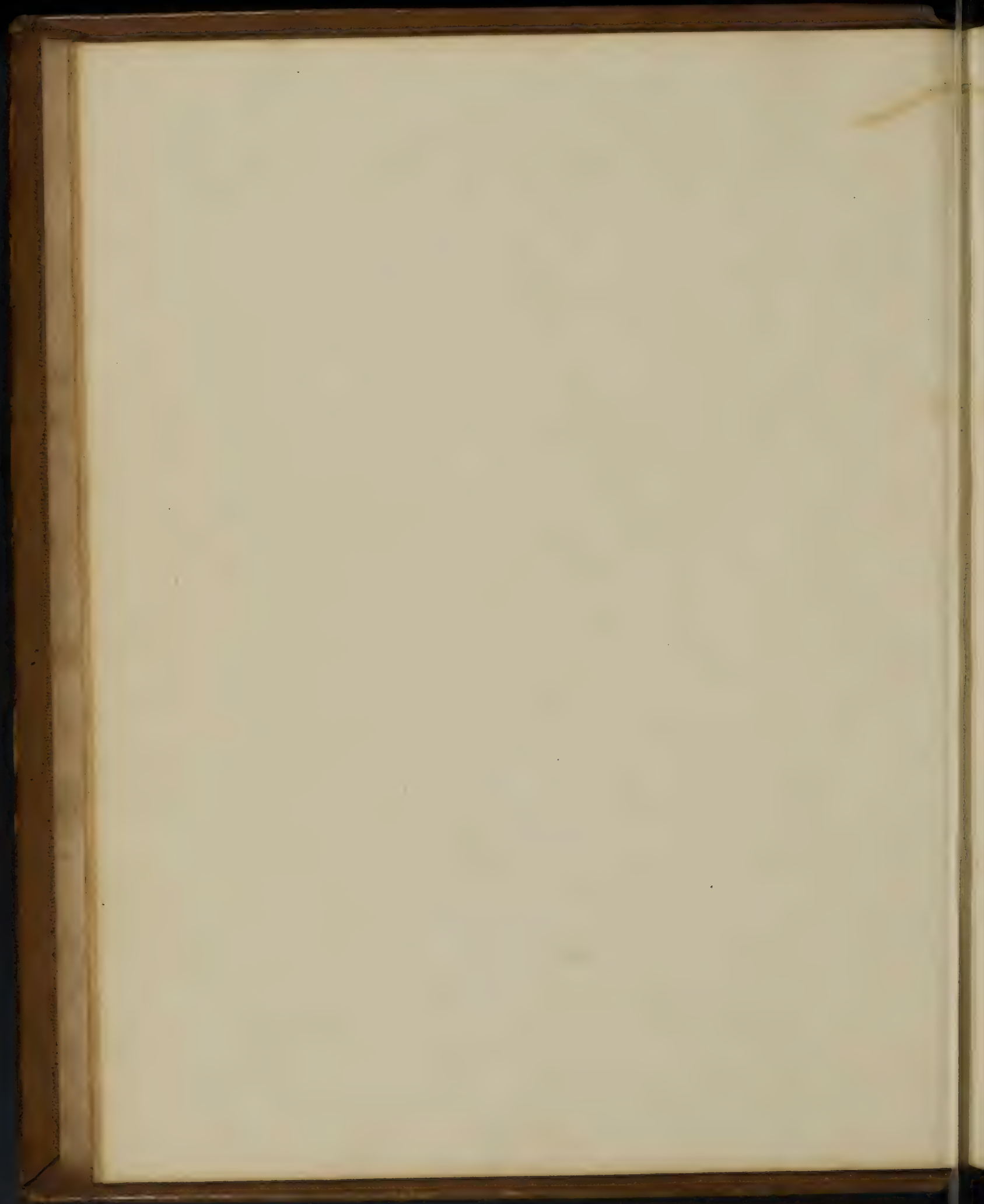
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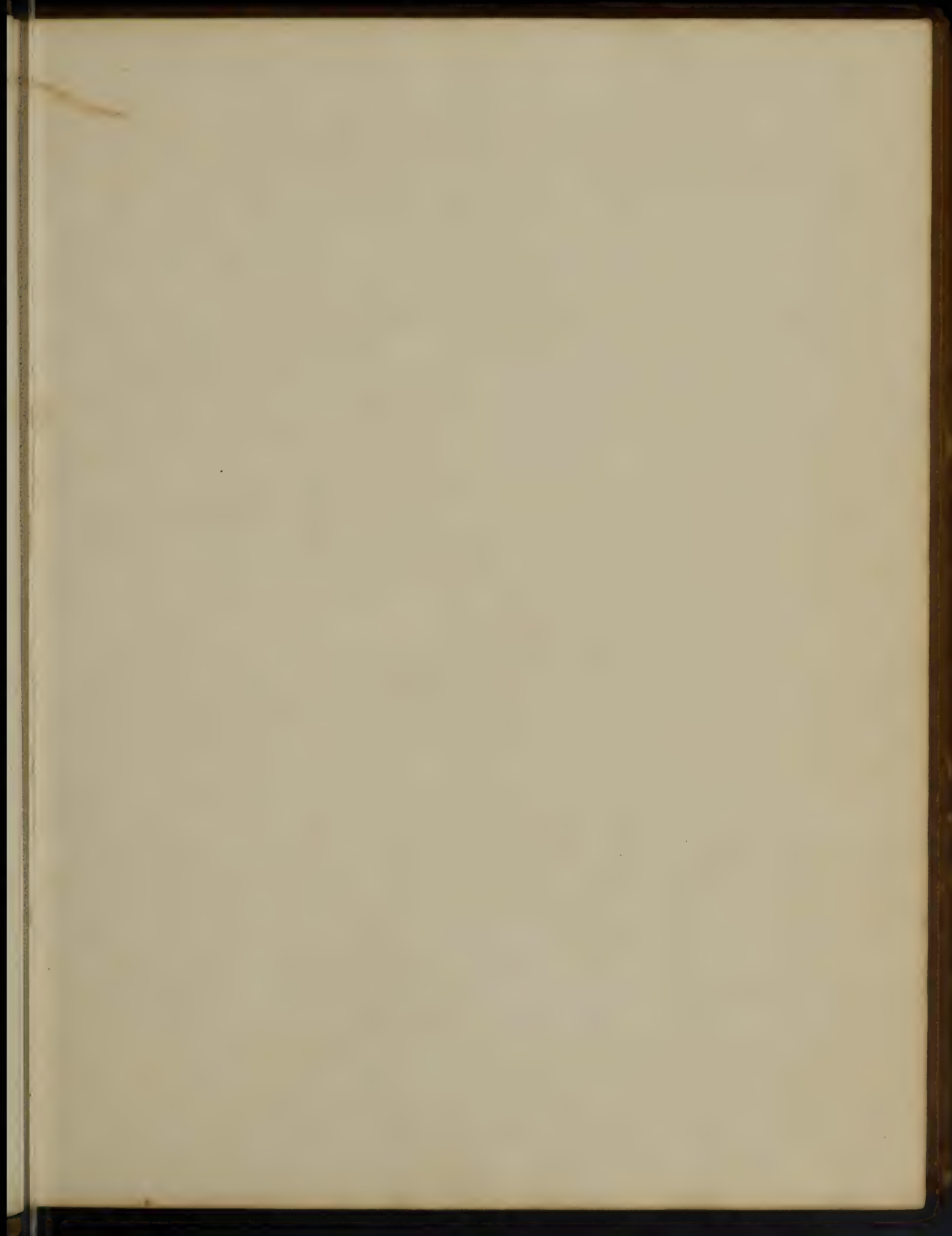
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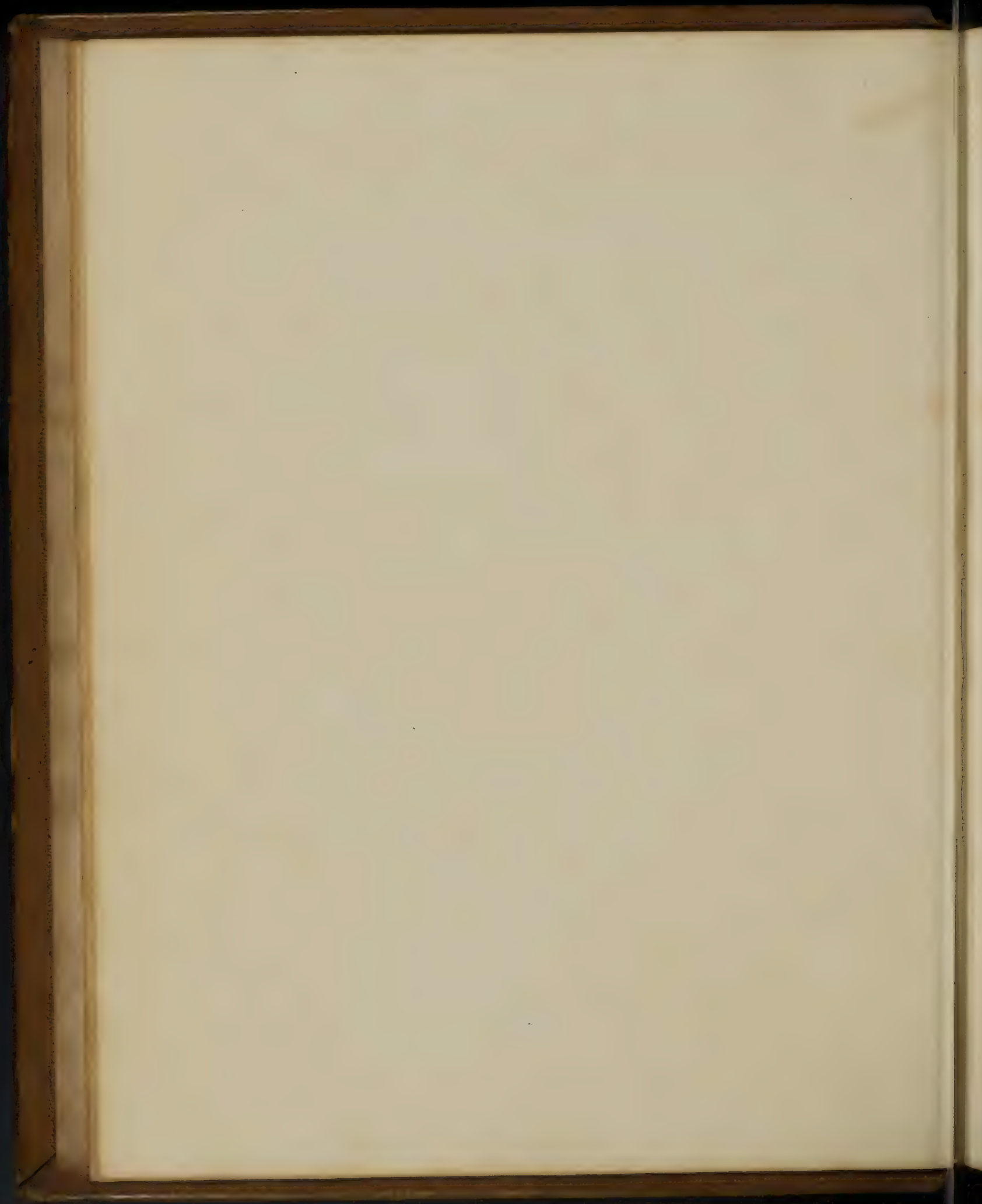


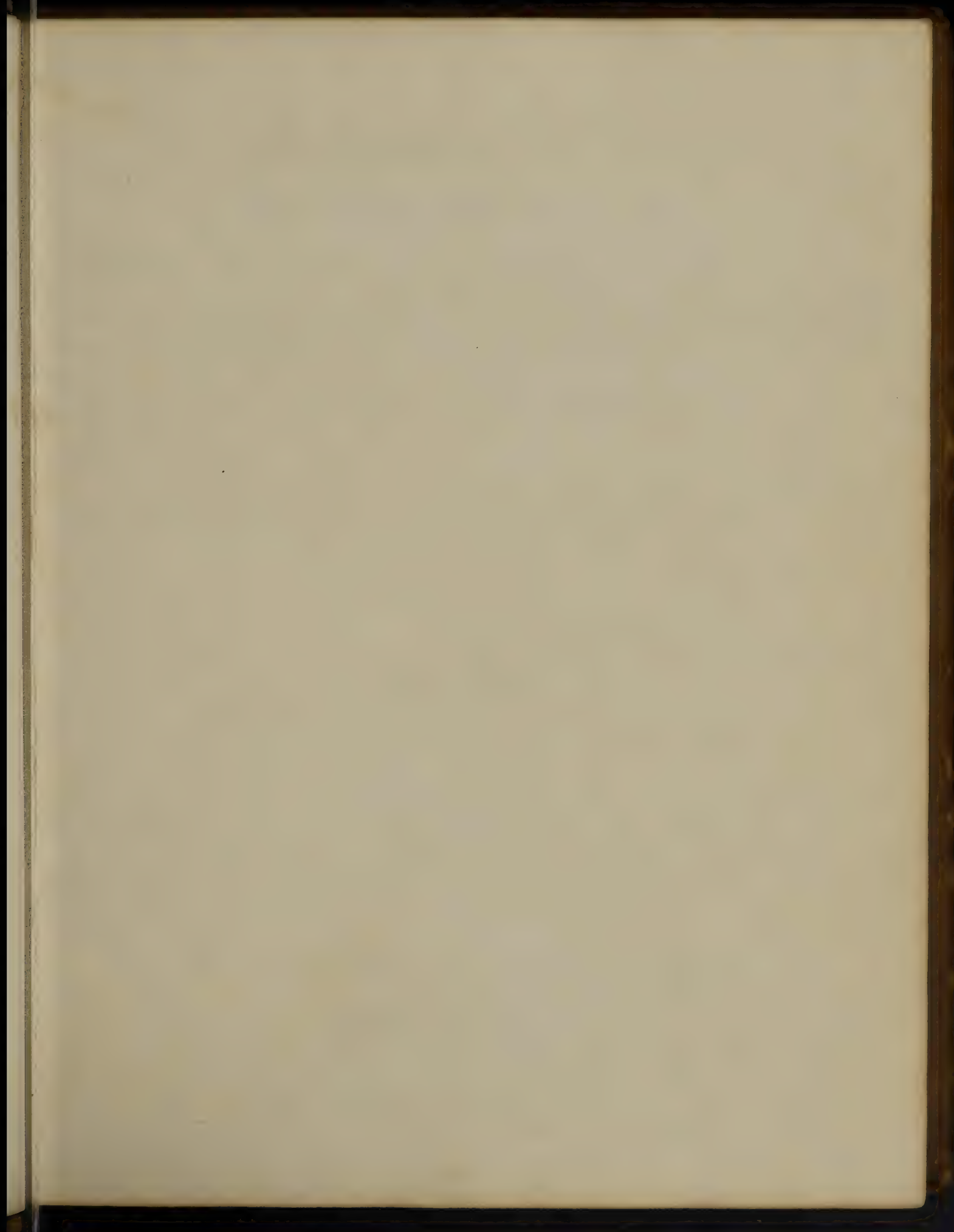


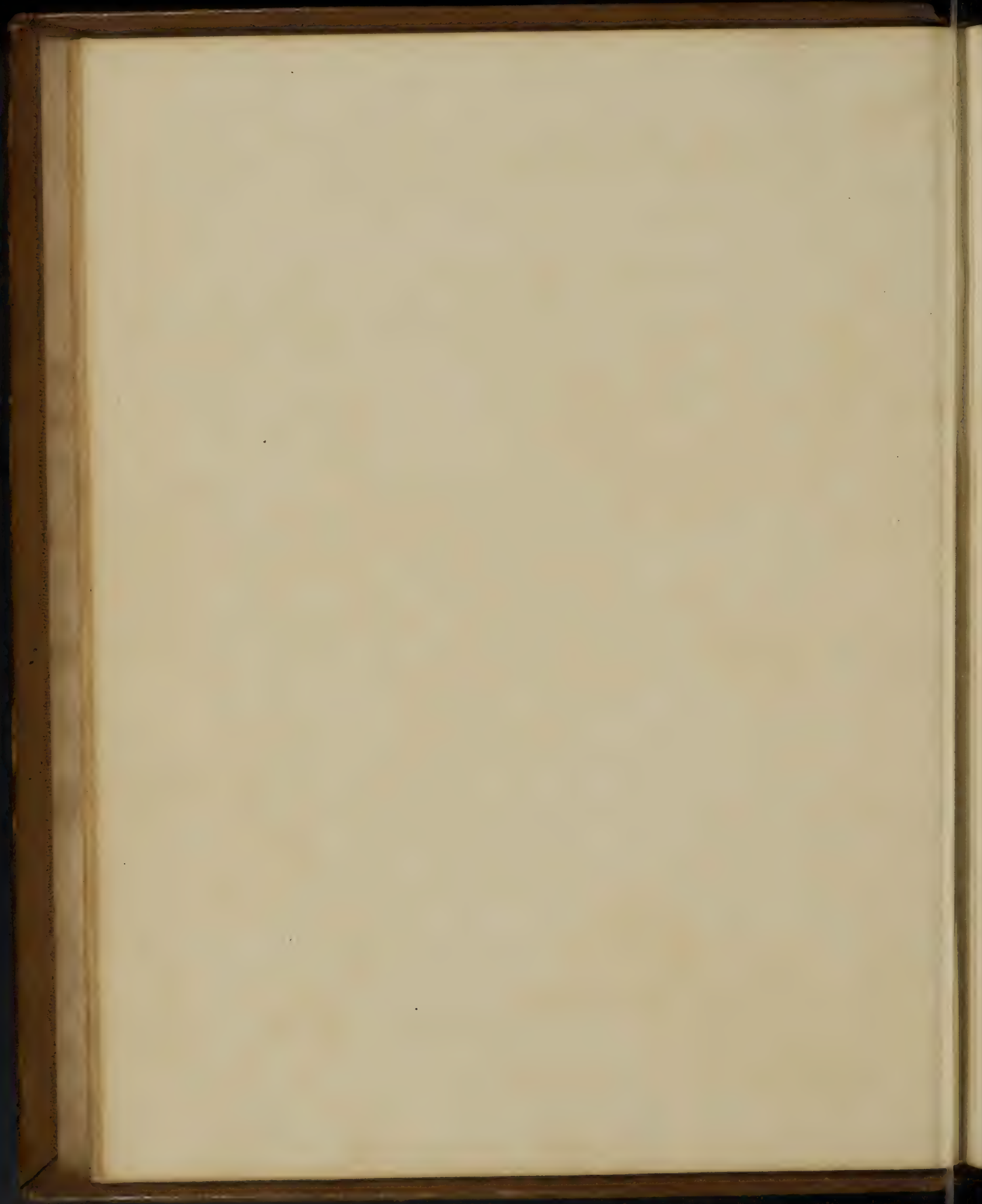












1

Bailment by

J. Gould Esq. 1874

Bailment is the delivery of Goods on a Contract express or implied that they shall be returned to the Bailor, when the purpose for which they were bailed is accomplished or answered, or they shall be dealt with agreeable to the Bailor's request. - Jones 3.48. 2d Com 468

Thus if I who is about to depart deliver Goods to a Tailor which will be returned a Contract is here implied that he shall deliver them when called upon. - So if Goods are given to a Tailor there is an implied Contract that they shall be delivered when called for and also that they shall be made up in a workmanlike manner. page 24

The great authorities have conformed to what appears to be the principle. But opinions and dicta are very various on this subject. See decision of Lord Holt in the case of Coggs v. Bernard and the treatise of Sir William Jones appear to be the only sources of knowledge on this subject. - 2d Ray. 915

Every bailment vests a qualified property in the bailee, i.e. a right superior to all others except the owner. But Lord Coke says, "owners have a special property, and chattel other bailees have none. - a lawful possession - man is qualified."

qualified property - and it is said the painter has
a stronger interest than a stranger.

It is stated that Common Carriers have a
lien on the property of the Bailor until he re-
 ceives pay for his services. Certainly when the
 bailment is such that it may be continued at
 pleasure the Bailor has no property as respects the
 owner but he has a right to it & therefore may keep
 it. Could the trader & goods it is judicially settled
 may maintain trover against anyone who carries
 them away. and yet property is held to prove
 consequently to Coke a petition is without foundation.

From the nature and obligation of bailment
it follows that the bailee must keep the goods safe
during the specified time, that he is liable for any
loss or injury that may happen during the time
of bailment. Can this result have been prevented or
negligence on his part.

And to determine whether the
 Parties have been negligent we must consider 1st
 The nature of the Bailment. 2^d The quantity of the
 thing bailed. and 3^d The Conduct of the Bailor.

We are to consider the nature of the Contract
 because one thing requires greater attention than
 other. and the nature of the Contract ^{make a} make a
 difference in the Subject in the same. ^{But} that the
 price may with propriety be a ^{consideration} consideration
 he will but he could not ^{be} be. So

So the value and quality may make a difference. To ascertain the diligence necessary from the Bailie is more difficult than any thing else in Bailments.

Different degrees of diligence are necessary in different Bailments. And to ascertain the necessary diligence in each case we must attend to the following rules which are founded on true principles.

1st The most general rule is that the Bailie is bound to keep or if delivered to be used to use the goods Jones 8. with a degree of care proportionate to the nature of the bailment and according to all the circumstances of the case.

In some cases more than ordinary care is necessary in others less is sufficient. To be able to understand this rule we must define the different degrees of care and neglect.

Ordinary diligence is that which rational men use in general use in conducting their ^{own} business Jones 9. in the diligence of common prudence. D^o 10. 11. 13.

Much in other cases must be left to the jury. To every degree of ordinary care there is a corresponding degree of neglect. Thus the omission of ordinary care is called ordinary neglect. Jones - 11. D^o 13. 31.

Slight neglect is omission of exact diligence. Gross neglect is the great omission of all diligence and prudence. This gross neglect is evidence of fraud in the Bailie: but not universally so if the

if the Bailor treats his own Goods & the same kind in
 D. Ray 915 the same manner. This is but the presumption of
 Jones 30 fraud - Gross neglect is in practice considered
 D. 94-5. equivalent to acts of fraud itself & is justly held
 a violation of good faith.

In order to apply these good & strict rules to
 particular cases, these rules must be observed.

*
 2 Cole 83
 D. Ray 915
 The Bailor is to
 take care in the
 4 Cole 83 and the
 and is not to be

1st. Where the Bailor is to the Bailor no more
 than good faith is necessary. I mean he is only lia-
 ble for Gross neglect which amounts to a violation
 of good faith. As where Goods are kept gross-
 negligently for a customer. It has been held that

Jones 15-10. even in this case he must keep them safe and
 D. 21. 22. 23. 24. but not his mind. But this is not law. Southwell Case.
 D. 32. 51. 54. 55. There is an exception to this rule when the
 Bailor makes himself liable for loss & loss of gross neg-
 Jones 48-51. lect by special agreement for the man to become
 an insurer against damages as shown by Sighting
 and Sighting &c.

D. Ray 916
 Jones 22. 23.

But when the agreement is Gen-
 eral being no special agreement, then the rule
 applies.

Jones 14-15
 16. 32. 89. 90.
 D. 91. 101. 105.

2^d When the Bailment is Gen-
 eral he is liable even for slight neglect, i.e. he is
 bound to use more than ordinary care.

Jones 14.
 Jones 15.

3^d When the Bailment is advantageous to
 both parties. here the obligation hangs in equi-
 librio only ordinary diligence is required e.g.
 Goods left at a Factor's shop made up.

These rules are taken from the Roman Law.

Jones 101-5

According to the C.D. Bailments are divided into Six Classes. and I adopt them not because they are logical but because the Books constantly bear reference to them.

Jones makes but 5 kinds of bailments.

1st The first class is called Depositum or a depositum. This is a delivery of Goods to the Bailee to be kept for the Bailor without reward and the Bailee is called a naked Bailee or Depository.

Grif. 618
Do. Ray 9/12
Bul. 247
Jones App. 7

2^d The second class is called a Commodatum. This is a gratuitous loan of Goods without any reward for the benefit of the Bailee - as a rule one cannot borrow a Horse to ride without hire this species of bailment is different from that called a "mutuum". A mutuum is not strictly a Bailment, for here the thing is consumed and is only restored in kind by returning an equal quantity of the same kind. It is not to be confused with a loan of money and becomes another Bailment when in "mutuum".

2d Ray 9/13
Do. 9/13
Bul. 247

The absolute property is transferred and the borrower must give the thing if it be by loss or other inevitable accident. This is very different from a "Commodatum" for in this the specified article is to be returned and the borrower is liable for its loss if it be by inevitable accident.

Jones 117-8
Bail. 348
Jones 89, 90
Do. 189

3^d This is called Locatio. This is a loan of a thing for hire or reward and the Bailee is liable for its loss if it be by inevitable accident.

Do. 113
Bul. 247
Jones 117-8

Box 914
D. M. P. 8,
S. Ray 903
D. L. 113

4th This Clap is called "Pignori acceptum & pignus". It is the deliverance of God in the security of a Debt due from the Gaoler to the Gailee. The Gaoler is called the "pignori" and the Gailee the "pignus".

5th This is called "Locatio operis factici" - This is a delivery of Goods to be carried by the Bailor or some act to be done about or with them for the Bailor and for a reward to the Bailor. In this fifth kind the act is done for the Bailor when this kind is called the delivery of a Cargo or freight to be carried to another place. It also the delivery of Goods to be carried or removed - So the delivery of Goods to a mechanic or Tailor in which some labour is to be done. - This says all "Gould" - Shows that this kind of Bailment does not come under the third class as Mr. ¹ has laid down, for in the third class the Bailor pays in this the Bailor pays. Common Carriers and Boatmen are ranked under this head because they receive property to do something with it.

82. 2. 9. 13
 83. 2. 9. 18
 84. 2. 9. 23
 Jones. 1. 1. 2. 8.

6th This class is called "Education", "Mandatum",
and differs from the 5th only that here the Bail
ce acts without our record.

We will not look for each other's safety day
themselves.

4 June 124
 Lane 41-2
 Seating 900
 P. 1 11
 4099

1st The first is called a "Deposition" or unfiled Bailment. This is a mere delivery of goods to be kept without any regard of the Bailor.

Bailee is liable only for gross neglect which is presumptive evidence of fraud. - Jones 44

18 Wm 347.
1892 157 a
Baileys 14
12 Mod 487.
word "ordinary" there
was no injury
12 Wm 214
Jones 52
Lug 1099
22 Ray 655
D. 914
48 Am 2300

Some say that ordinary care will not discharge the Bailee but others say less than ordinary care will and that he can be liable only on the ground of fraud. Of breach of faith surety and be gross neglect of the Bailee can rebut the presumption of fraud. He is not responsible as if he treats his own goods with the same negligence as he does those of the Bailee.

So if he is a drunken fellow and sleeps with his doors open so that his goods and the Bailors are equally exposed still he would not be liable. - In this case I suppose no express stipulation to extend his liability but only that the law implies and that the exchange was proved. "in ipsum facit cessare tacitum."

22 Ray 911
D. 913

Some say if the Bailee in this case obtained the Bailment by his own officiousness he should be liable for ordinary neglect but this distinction is too refined for practice and not mentioned by any authority.

Jones 54-5

In Southey's case this rule is denied but this case is not used and in this case the decision is right but with one exception in the whole case. This was an obiter opinion.

Lug 1099
4 Wm 83
Croft 815
Jones 54
22 Ray 655
D. 911 & 913
48 Am 172
12 Wm 214

There has been a distinction taken between a special agreement by the depositor to keep

Factor who has himself been guilty of fraud in con-
cealing the facts of its contents. The Law will not
compel a person to keep goods so long when their
existence is not and can't be known. So too the
Contract amounts to no more than an insurance
for he must promise to keep them safe - will
under the insurance Law he would not be liable
if there is the least suppression of truth as to the
Statement made of the Goods or any part of them
to the Insurer. it is if it is the least in interest
the Insurance is void.

78 Rep 703
D. 705

The deponent may extend his liability by
express stipulations a promise to keep the Goods
safely does not subject to all events. not against
any act of God, for "actus Dei nemini facit in-
juriam" nor is he liable for loss occasioned by
force violence as Robbery, tho he is for actual
secret theft. Hence it follows that he is liable for
some default of his own. If however he
should by negligence any way so expose the
Goods as to tempt a Thief, he would be liable
for this act of public violence.

20 Rep 911
Jones 62
D. 63, 75
20 May 915
D. 130
Robt 34

If the deponent refuses to restore the Goods
when properly demanded or has converted them
to his own use he is liable in an action of
detinue or Trover or an action of assumpsit on
the promise.

Rom Dig 230
1 Roll 128
Cus Pls 78
Gros 114

An unlawful detainer after de-
mand is Conversion. It is said if the article is

is expensive to keep the depositary may use
 Jones 93 to defray the expenses of keeping a good horse
 page 16

2^d "Commodatum" - this is called in Eng-
 lib a gratuitous loan or lending it is loaning
 De 250 for the sole use of the Bailee who is to return
 Jones 74 the thing specifically and without a reward
 De 244 This Bailee is bound to use more than ordinary
 Ed Ray 910 care and is liable for less than common negli-
 Baile 141 gence. - So if he leaves a horse which he
 puts in his stable and he is stole the Bailee
 is liable. But if the door had been broken open
 or unlocked he would not be.

This is certainly requiring more than ordinary
 Jones 912 Generally the borrower is liable for loss occasioned
 by theft unless he proves more than ordinary care
 was used by him i.e. he is "prima facie" liable
 for the loss provided it lies on him

De 916 The borrower is not generally liable for
 Jones 95 such acts as he could not resist
 Pl. Cont 251

But he would be liable in case of a robbery
 Jones 789 if it was the consequence of his own rashness
 or his going out of the road in the night

He is never liable in this case unless the
 goods are lost by some want of care or negligence
 on his part. A bailee of this kind is never lia-
 ble for inevitable accidents as lightning tem-
 pests &c. But

But Mr Gould thinks he may make himself
self liable even in these cases and that the same
observation is applicable to every species of
Bailments. - It is clear he may make himself
liable for inevitable accidents by a previous
breach of trust and this is true of every Bailor
thus if A should borrow B's horse to go to New
Haven and should go to New London and there
lightning should kill the horse the Bailor would
unquestionably be liable. So if he should have
had a horse and keep him too long and he is killed
still he is liable & this rule applies to all kinds
of Bailments. Because he ceases to be a Bailor, and becomes
a wrongdoer immediately after deviation from his
entrusted duty.

Lo Ray 913
Do 917
Jones 78-9
P. Bail 244
Do 237-8
Do 244
P. Bail 243
Do 253.

3rd This kind of Bailment is called a "Bailment for
hire" or "Bailment for use" and is distinguished
from the other kinds of Bailments by the fact that the
Bailor acquires a special property in the thing bailed and the Bailor
an absolute right to the thing.

Jones 80-7
Lo Ray 913

This Bailment being advantageous to both
parties the Bailor is required to exercise only
ordinary diligence and is liable only for gross
neglect. It is said by Mr Gould that in this
case the utmost diligence is necessary and that
the Bailor is liable for slight neglect which is
making the liability the same as in the second
class. The extent of diligence is
"ordinary neglect" at the time when this case was
decided.

P. Bail 251
Jones 87-8

22nd May 9/11 decided seems to have been used without any delin-
quency meaning

22nd May 9/10 a horse is accusable in case of theft and if a
horse of a thief is found in a stable for
the 4th the destruction could not exist if the
horse is true

Jones 87-8 I have may or may not as the
circumstances are to be looked for. Jones
means this sentence as to the 4th is directed and
that the Roman jurists and he does not consider
these of course as a sufficient support for this
view of Hall. do that it appears to be set
the fact nothing more is required than ordinary
care of a horse and that he is liable for a
neglect. The time must be the
thing with ordinary care. it is prudent men gen-
erally use such things. Hence he is exempted from
losses by robbery, unless he rashly exposes the thing.
If he puts the horse into a stable that is
locked and he is stolen. still he is not liable
otherwise if the stable was not locked.

But in Conn. the "des tate" governing the
of property: think he would be liable if the stable was not
locked.

22nd May 9/20 it has been a question whether the Bailor
Bail 521 must keep the horse in repair during the time
1st term 321 of the bailment. It is settled he is not with the
Bailor must himself keep it in repair.

4th This class of Bailment is called a Pledge and security of a Debt due from the Bailor to the Bailee this in its nature is analogous to a debt. But from that it differs in several particulars.

The maxim is "Mortgage, mutatis mutandis" applies also in Pawns. And a Mortgage always a Mortgage. So once a Pawn always a Pawn.

The maxim is not correctly expressed. It means only that if the Pawn of a Mortgage is so made, and there is another document to the contrary, this is void. So when one delivers an absolute title to another and the Pawner gave a writing which showed the goods were really given in pledge, tho' the title was absolute, and the writing showed that if the Debt was not paid on such a day the goods might be sold, still this was decided to be a pledge.

page 19

2 Str. 978
1 G. 2. 114+
The meaning of that
max is that, the law
treats them the thing
as in a debt and not
as a gift. Accomplished
redemption by equity
without standing an
agreement that D
should not be made
the money was paid at
the time of sale. This
rule is made to protect the pawner.
See page 19

In the case of a Pawn the Contract is an analogous to both parties. Hence the general rule that the Pawner is bound to use ordinary care only and is liable for ordinary neglect only.

2 Str. 977
1 G. 2. 833
1 R. 2. 357
Jones 867

But in Southcoles case it is decided that the Pawner must use such care only, as he does to his own goods. But this is only making him a depository and is not Law.

4 G. 2. 83.
Co. 10. 87.

The Pawner is liable only for ordinary neglect but he is not liable for Robbery or fire.

2 Str. 978
1 G. 2. 833
Jones 87

Jones reports that Butler said that if a
tender there is a refusal the pawn becomes a Jones 91
deposit but Jones shows this is not true.

By tendering the money the Pawnor becomes
the depository for the pawn and the pawn has a right to the money and the pawnor is
liable if it is lost by gross neglect and in specia
ing the tender you must allege you always
have been ready and able to discharge
the Debt.

In some cases the pawnor may use the
pledge and in some he may not. He has a
right to use Jones says is founded on the im-
plied consent of the pawnor when there is no ex-
press one and that the consent is presumed or not
as the case is likely to be made better or worse
or not at all to be affected by use.

Thus Butler the accuser is not at all by use
yet it is said that he uses them at his peril and or
several cases will not excuse him. At 92
says that is a very strong rule since the pawnor
is presumed to have his consent. The right in the
case of the pawn is founded in mere indulgence.
The pawnor is at an expense in keeping the
pledge. He may use it to reimburse himself.
There is no necessity for presumed consent here it is clearly
a matter of justice which there ought to be some
limit to the right. I should say he ought not to use
it longer than is the limit of indemnity he was
compelled.

Salp. 525.
Butler 89.
S. 91.
Butler 234.
Butler 234.
Jones 92-3

Page 75
Butler 435
Jones 112
S. 91
Salp. 522

If then the Pledge will be in no way in-
 jured by the use he may use it at his peril and
 the rule is laid down by Jones (who I find has
 Jones 94. where also) that a defendant may use the goods
 page 10. bailed unless he is at any expense in keeping them
 I think this a just and reasonable rule. Signed.

But if the Pledge is injured by using the
 goods has no right to use it.

But I suppose says Gould he ought to
 have the right in this case if he is at any ex-
 pence in keeping it for he can recover the
 4 Com. 258. thing for the keeping the Pledge the examples
 under this head are such as where is no expense
 in keeping as wearing apparel and the Pledge
 must both use them.

I conclude in this case if the Pledge
 5 Bac 257. does use the Pledge he is liable in an action
 Com. 251. of Trover for the unlawful use is a converted
 D. 287. thing and there is no necessity for tender or pay-
 ment of Compensation. Com. 251. is an unlawful taking, using or detaining. And if
 the goods are not returned or payment is tendered and refused it is a Trover.

unlawful detainer
 or use of a bail
 the goods are not
 returned.

Lord Holt says that the observations
 attributable to Tandy are so to the finding of
 goods. Potho lays down the same rule and
 says that the finder of goods is bound to use
 ordinary care and diligence and is liable only
 for gross negligence - Mr Gould thinks that
 that the finder of goods should use ordinary
 care. tho he is not properly a Bailee.

3 Com. 257.
 1. Potho 257.

It is said in Croke Elizabeth 219. that the
finder is not obliged to keep goods safely, and is
not liable for neglect. — Now if it be that the Courts
mean that Grover would not lie the principle is
correct for Grover will never lie for a nonfeasance.
But if the Courts mean that the finder is not bound
to use ordinary care they were certainly mistaken

2d Ray 917.
Parker 252.
Exch Dig 599

that Grover would lie for a nonfeasance and

Exch Dig 590.
Exch Dig 599
Baugh 243
Lalor 555
5 Burr 2837
Holt 251.
5 Coke 146

In Court there can be no question on this
point, for here by Statute the finder of goods
has a lien upon them and the owner is compe-
lled to pay the expense and trouble of keeping
them as both are benefitted according to the gen-
eral rule. The Pawnee must use ordinary care and
diligence

Stat. 635-6

At C. & the finder of goods has no lien on
them and if he refuses to deliver them up on demand
from the true owner he is liable in trover.

Slag 551
2d Ray 393.
5 Bay 240.
2d Bk 254.
Wm Bk 117-

There remains a question whether the finder
can in any way recover for his trouble and expense
against the owner. * if he can it must be in an
action of "Indebitatus assumpsit". Mr Gould
thinks he is without a remedy for to support this
action you must show a special instance and
request implied of the party for whom benefit
it was made and also an implied consent that the
cost be done. It is a mere voluntary gesture for

* This is a
very narrow question
and is settled
Vol 2-333-4
2d Bk 254.
D. 268
Holt 105
Exch Dig 599
Parker 252

law which at C's no action was with A and
 the it may be a moral obligation part of
 the owner to pay still this will not raise a
 legal one.

Book 312
 G. P. Q. 390

But a refusal from the lender to
 deliver up the goods to the true owner is not
 "force" - Conclusion but only "prima facie" it
 will be concluded if not rebutted the true own-
 er must give satisfactory or sufficient evidence
 that he is such and what is said the jury only
 can determine

Book 348

A singular question has arisen
 in Court. A lost Goods and B found them and
 C said B stole them and B swore for them and
 in Court as his Goods and thus he passed to the sat-
 isfaction of the Ct. he forged Goods. A after sued
 B in Trover for the same Goods and B pleaded
 in bar the former recovery of C but the Ct. said
 the plea insufficient.

* See 2. - 122

"He said" - I have never known a similar
 case but I know this is not law. I think the
 last recovery is a good bar. The man found
 settled of the money at once and when he first the
 Debtor paid him the debt, he does it voluntarily
 by and at his point and consequently was he com-
 pelled to pay it again to the true owner.

But it is not so if the Debtor is sued and
 recovery is had against him for it will be
 of said that when a man is compelled to pay

a sum of money by process of Law to a wrong
person he shall not be compelled to pay it over.
as said. tho. if he had done it voluntarily he might
have been. — In case of a false Probate to a Will
a payment takes place by a compulsory pro.
cess of the Law the real Executor can compel an
other's payment. — Suppose a payment is made
to a bankrupt as proxy of Law who has debts
against persons in another country he has then
sued and received them in his own name. This is
a case to another action for the same debt by the
assignees. tho. the property was theirs. — In Court
the decision was contrary.

35 Rep. 125
5 Bac. 11
17th Ed. 669
Do. 882
Dun. 161
Co. 33370
2d Ed. 408
Ac. 545
1 Bac. 242
Note 1.

If perishable goods are pledged as a security for a debt, and before the pawnce may still be covered his debt tho. the security has ceased. If he pays it a payment of debt merely security for the debt.
It was not so formerly and the rule is the same as to a ransom price, under the Law of Nations if a hostage was given at the same time and the hostage died the Gild would subject an action.

1 Inst.
4 Com. 258
Go. Salt. 523
1 Inst. 179
1 Inst. 209
3 Bac. 1734
3d Ed. 563
Dun. 610
2d Ed. 248
1 Inst. 209

NOTE 2nd

If the pawnce doth redress the pledge at the day in Law. tho. not in Equity the pledge becomes a absolute. the same as in mortgages.

Exp. Dig. 80
3d Ed. 395
Bac. 138
2d Ed. 618
Exp. Dig. 160
2d Ed. 980
Bac. 538
17th Ed. 114

And the rule is the same tho. there was an agreement that a time the pawnce should be no redemption. page 13.

If the pawnce is lost then the pawnce is agreed for want of ordinary care is secured.

the debt is extinguished - but this is not a reason -
 Buss 1154 after said since the Pawnee is liable to the
 Jones 87-8. Pawnee for what the Pawnee was worth. But it is
 Edley 919 said in the Pawnee used and charged still the
 D. 917 debt will not extinguish the debt
 analogy 378
 1st 382

Vol 1 page 168
 176th 302
 1178
 2 Com 237
 1044
 504
 I mean he can't transfer his lien so that it
 shall be good against the Pawnee and if he may
 transfer it then against himself - He may be
 said the good to satisfy a general mortgage and
 if he does pawn them then he has made the
 Pawnee's obligation to him being made
 the Pawnee may request due the pawnee
 in Groves.

1st 205
 3rd Com 435
 The pawnee may sell the pawn after
 the day of payment for then his right becomes
 absolute in law and the Pawnee cannot get
 from the Pawnee as he can in the case of a
 Mortgage

A question has been raised whether
 the Pawnee in this case can compel the Paw-
 nee if it has the article after the day of pay-
 ment to return him the surplus of this debt.
 Mr. Gould thinks he could not be compelled to.

There is another question whether the Pawnee
may before the day of payment assign the
Pledge, it is said by some he may - as he -

.Owen 124
4 Com 258
1 Baly 31.29
Coo pa 244
2 Baly 178
5 Baly 580
1 Baly 238

This point is it putable for there are
shanties which say he can't and which take
to be on the right side. Before the day of
payment he has only a lien which can't be trans-
ferred and as a rule that a pawn can't be for-
feited by any offense of the pawnee i.e. his inter-
est in the thing can't be forfeited and the reason
is he can't repossess it for it is a promise that
he for ^{only} what he can convey by ^{contract} transfer in his own right

.53 Rep 500
Contract 8
12 Coke 12
Coo pa 550
2 Baly 370
Coo pa 244
2 Baly 178
Vol 1 354

Again the interest of the Pawnee can't be had
him in Eq^{ty} for debt. It would seem then he can't
not sell it so secure his Debt but if he has an
assignable interest in it it might be taken in Eq^{ty} -

.1 Ky 359
1 Baly 238
Dyer 352
4 Comyns 258

But on the other hand the Pawnee may
forfeit the Pledge and so he may assign the
redemption. But he forfeits only his right and the thing stands in
his place and must discharge the Debt -

1 Baly 26
4 Com 259
Vol 1 178
Vol 1 354

There is a case in Vernon that seems to
prove that the Pawnee may assign before the
pay day, but in that case the assignment
was made before pay day and the bill was
brought up the Pawnee after pay
day the bill there he takes the bill and so he
has paid both the Debt and the assignee with the
Lend money. - because said they - at the bill was
not brought up at the point on the assignment
the matter made before it was the same as if made
after the interest is absolutely gone of Law

.2 Wils 898
2 Wils 691
Baly 436
NOTE 3 +

Dec. 238 It was once holden necessary that the Pawn
 1849 should be delivered at the same time the money
 2 Dec. 30 was paid of which the Pawn was only a receipt to the
 1849 the Goods, but it is now settled that the Pawn may
 be made at any subsequent time.

2 Dec. 30 If A delivers Goods to B as a security of a
 Debt due from A to C. & becomes Pawned and A
 1849 has no right to countermand the delivery but if
 Dec. 49 A would give to me which C would not be considered
 Equiva. as a loan unless there was some agreement be-
 1849 A & B.

If A delivers Goods to B for a
 2 Sep. 2955. loan donation for C. he may countermand the delivery
 1849 at any time for there is no consideration - it is a
 2 Dec. 30 gift without delivery, and fees no right to the
 Donee.

4 Com. 258. It was once held if no day was men-
 1849 tioned the right of redemption continued during
 1849 the joint-lives of the parties but now settled
 1849 the Pawnor may redeem any time during his
 1849 own life, and the Pawnee should be dead.

The Pawnor in law in this case has
 his own life to redeem in. M. could think
 his Ex^{or} or Adm^r may redeem in Equity. If the Pawnor
 1849 dies before his own death delivers the Property to
 1849 a Stranger without consideration. Under is to be
 1849 made in the Pawnee's Ex^{or} or Adm^r and not
 to the Stranger, and if then the Stranger still
 retains the Property he is liable in Trover.

But his right to
 redeem is personal
 and cannot be
 transferred -
 that is why the time
 limit is so short
 before the Pawnee
 dies or the property
 is transferred.

But if the Pawnee had delivered the pledge
to a stranger on a consideration before the pay-
day, the question to whom Tredem is to be made
is the same. as ^{whether} the Pawnee is assignable *Hyde 178*
before law day. If they are assignable, Tredem *page 21*
must be made with the stranger if not to the
Pawnee. *Ex. or*

When there is no day of payment fixed *Bulst 29*
and the Pawnee does not redeem during his life *Ex. or*
time, his Ex. or can't redeem after his death. *at Lib. 239*
Law this is for the benefit he might in Equity

If the day of payment is fixed the death *Bulst 29*
of the Pawnee does not affect the right of redemp- *Bacon 239*
tion and his Ex. or may redeem. *at the day he still has the Equity of Redemption*

5th Class of Bailments. This is a delivery *Jones 92*
of goods by the Bailor to the Bailee to be carried
from one place to another, or something else to
be done with or about them for or reward to the
Bailee. This kind of Bailment includes
a delivery to one in his private capacity or to
a person exercising some public employment
in his professional character. As a private one as
a Merchant, a Public one as a Common Carrier
or an Intaker. Between these two classes
there is a material difference

First then I will consider Private Bail-
ment or persons exercising private employ- *Ex. or 918*
ment; of this kind is the delivery of goods to a *Jones 30*
private man to carry from one place to another, *Bacon 1289*

Walter 4 to a Taylor to make into clothes to a Black-
 Moore 543. Smith, Factor Agent be. So also the delivery
 Powell 354. of cattle to an assisting Farmer. -

Jones 12030 The Bailment is restricted to both par-
 D^o 131139 ties hence the Bailor need use only ordinary care
 Southwell
 Ingersoll

Edwards 918. The Bailor being liable only for ordinary
 12040-487 neglect he is not liable for robbery. -
 Negley 121. But he is "primed" liable yet this is re-
 Powell 254 sulting from the fact that he has used all ordinary
 Jones 128. care and attention

D^o 133-38 Jones says if the Bailor is a disinterested
 20000 P. person the Bailor is liable for it is ordinary
 14044-131. neglect. Note 4th
 4044-84. The thing the Bailor is liable for is ordinary
 4044-4 neglect.

Jones 105. And where the property is taken by
 30000 8. the Criminal of the Bailor. The Bailor is liable
 20000 8. for his and the Bailor's property which has paid the Bailor
 20000 164. cost debts.

When one delivers Goods to another to repair
 and some act of skill or workmanship on them
 two things are implied. - 1st That the thing
 shall be repaired. 2nd That the laborer
 shall be done skillfully, and on failure
 of either of these acts the Bailor may have an action
 against the Bailor. But where the act or skill
 was not that of one's profession there is no implied
 promise that the thing may be repaired.

Jones says ordinary care does not imply.

that a private Bailor shall insure the Goods
against fire, and that if they are lost by fire
he is not liable. Now I should think this would
depend on the usage of the place and that he Jones 142
would be bound to insure in those places,
where men generally insure, and charge the
premium to his Tenant. But in those places
where it is not usual to insure I should
think he was not bound to insure.

But suppose the Goods lost or destroyed
while they remain in the hands of the Bailor
who is not of this case which the Editor inquires. *Ch. Dig. 86*
of the Bailor. Can the Bailor recover for his la- *St. Bar 1592*
bour spent on the Goods before they were lost? *D. 1565*
I should think not for his labour is of no use to *benefit**
the Bailor, and further it was the fault of
the Bailor and by his negligence that the Goods
were destroyed and in this case the Goods are lost
by ordinary neglect.

Second. Goods taken to a public Carrier or
to a person exercising a public employment
in a professional character, as Master of a Ship,
Inkeeper, &c. the most usual class under this
head is Common Carriers, and of these we will
treat more particularly.

A Common Carrier, is any person who
makes it his usual business to transport Goods. *Whar 220*
from one place to another for hire. He differs. *Whar 18*

* This of this Author says I do not. why the rule should not be the same if the work were finished, and I do not know but this is the rule.

2d Ray. C. 18.7. from a Private Carrier, in as much as the latter
 15 Rep. 127. cannot make it his usual business - under this
 4 Coke 84. Clerk may be ranked a Common Carrier a Common
 Bacon 343. Boatman a Master of a Ship who carries Goods from
 Jones 150-2. one place to another.

Per J. 330.

Verby 238. It was once held that only Land Carriers,
 D. 190. could be ^{Common} Carriers but in 2 Charles Masters of Vessels
 Hold 17. 180. were made Common Carriers. And in the time of
 Jones 1139 James 1st it was extended to "haymen".

2d Dig 423. Now Ship Owners as well as Masters are Com-
 mon Carriers and an action may be sustained
 3d Sess 251-9 against the Owners or Masters - this is an exception
 15 Rep 40 to the general rule of Master and Servant.
 Gaithers 233.
 2d Sess. 89.

But by the Stat. George 2^d the owners are li-
 able only to the amount of the value of the Ship and
 18th J. 18. freight if the loss was occasioned by the Master
 D. 78. and mariners. So of course they may not be li-
 able to the amount of the Goods lost at this may
 3d Sess 251-9. exceed the value of the Ship and freight. But
 Cartho 88. the Master is liable to the amount of the whole loss.

A Common Carrier, whether an inland Com-
 mercial or Public, who enters into a contract with the Public that he will carry Goods
 3d Sess 1802. for any one who is entitled to him is bound to
 3d Sess 344. his time is rendered him and he has no convenience
 3d Sess 168. for that purpose or for which he is required and if he
 Hardup 103. refuses in such case an action may be had
 against him on the Case for damages and the
 rule is the same as to an Innkeeper if he has con-
 veniences and refuses to entertain a traveller but
 an Innkeeper is not obliged to entertain his neighbours.

But tho, a Carrier is bound to accept Goods
 till he may make a special acceptance. so
 he may refuse to take Goods till the owner
 informs him what articles are in the boxes
 & say be. and if Money, jewels or other value
 able articles are there he may demand so much
 "per cent" and not carry by the pound

As this Liability is advantageous to
 both Parties if there was nothing to impede
 the Genl. Principle the Com. Carrier would be
 liable for ordinary neglect, delay and so the Road
 journey & load. and he was not liable for Rob
 bery

But as the habits of the English became
 commercial the Laws became more rigid and it
 was determined in the time of Edward the 1st that he
 is liable for Robbery

And now it is settled that a Com. Carrier
 is liable for the loss of the Goods except it is
 occasioned by the act of God or the Public en-
 emy or the act of the Driver himself these are
 the only grounds which will excuse him

Public Policy and that only has in a
 this exception to the Genl. rule. Note 5

It is to be collected the moment he ceases
 to act for a reward he ceases to act as a Com.
 Carrier, and becomes a Mandatary.

4 Burr 2298
 11 Mod 622
 Jones 144
 11 Mod 89
 11 Mod 402
 11 Mod 2
 11 Mod 342
 4 Coke 84
 11 Mod 131
 11 Mod 128
 11 Mod 918
 11 Mod 27
 11 Mod 48
 11 Mod 281
 11 Mod 1503
 11 Mod 270
 11 Mod 485
 11 Mod 604
 11 Mod 1021
 11 Mod 1034
 11 Mod 145
 11 Mod 918
 11 Mod 742

Now a Com' Carrier is in the nature
of an Insurer against all events except those
Surp. 8 above mentioned. and he is every Bailled an in
18th Feb. 83. Insure against the risks for which he is liable
Sup. 128.

By the act of God is meant inevitable
accident, or as it should be said. Defined it "Such an
act as could not happen by the intervention
of man."

18th Feb. 84.
21st Feb. 113.
18th Dec. 80. These by Lightning, is not a deemed the act of God.
Dover. 18. or an inevitable accident.
Sup. 128.

But 18th Dec. 70. On this principle it has been decided that
18th Nov. 81. when God was lost in a ship by means of a
Jan. 14-8. falling a ball in the hold the Carrier was
liable. Tho' it is not as Jones says ordinary neglect!

A Com' Carrier is not excused when
the loss is occasioned by a Mob or by Robbers.
18th Feb. 82. for they are not deemed public enemies. But
18th Feb. 85. 15. Public water Pirates, is such as infestations and
18th Feb. 86. 19. Robbers, are not public enemies but Robbers only.

Note 6.

18th Feb. 87. If a Landlord should make it necessary to
18th Feb. 88. leave God's overboard the Carrier is excused.
18th Feb. 89. In one case where a box of jewels were lost overboard
18th Feb. 90. the Carrier was found to pay their value but it
18th Feb. 91. was held that they could not have been lost away as
18th Feb. 92. their weight is small.

But as to Com' Carrier
18th Feb. 93. by Water there is a rule of the Admiralty Court
3.3 594. differing from the Com' Law & of the God's

are those overboard, must be paid the value of the
 persons on board the Master, Owners, Freighters
 and Passengers must average the loss. —

1. Reg. 230.
 2. Root 50.
 3. St. Crisp. 291.
 4. 25. Reg. 467

If a Carrier voluntarily exposes
 his goods to danger by an act of God he is not
 excused. So if the place to sea is a tempest.

Reg. 128.
 2. Reg. 120.

He is excused by the act of the Bailor
 himself. Hence if the Bailor puts into the Wag-
 gon a pipe of Wine in a jamming state, and
 it bursts the Bailor is excused.

Reg. 10.
 2. Reg. 10.
 3. Reg. 10.
 4. Reg. 10.

And it is said if the Carrier's Wagon is
 full and the Bailor urges him so much as to
 induce him to move his goods, the Bailor
 is not responsible, i.e. he can't be made lia-
 ble to the extent of responsibility in a Carrier
 in general.

2. Show. 127.
 3. Reg. 344.

The order to deliver in a Carrier
 is as such, it is necessary, that the goods should
 be injured or lost, while in his possession, or
 while in his immediate and sole care.

So if the Bailor should send his servant to take
 care of goods put on board of a horse and they
 should be lost or injured the Carrier would
 not be liable. — But if goods should be deliv-
 ered to the Carrier and he should ask a passenger
 to keep an eye on them this would not excuse the
 Bailor. Carried. — So that the rule seems to be the same. —

Reg. 121.
 2. Reg. 121.
 3. Reg. 121.

If the Carrier does not have control over the
 goods,

Black P. 90. Goods. He is not liable as a Com. Carrier. So if a
 Steep. 490. passing in a Stage Carrier baggage - as he
 Bacon 344. has continued of it. He is not liable
 Croft 330. in case of a loss for he has no continuance over it.
 But in this case
 I think he would be
 liable for any loss
 incurred by neglect
 of the carrier. The
 rule laid down with
 this qualification.

A Carrier who has not the contents of
 a box, is liable for its contents unless there is
 a special acceptance, and if his acceptance is
 special he is liable for just so much as he
 undertook. as to the residue he does not act as
 a Com. Carrier, and hence is not liable as such
 in other words he is liable for that so much as his
 reward extends. Thus if a box is represented to
 contain 400£ and he is paid for conveying
 that sum only, when it actually contained
 800£ the Carrier would be liable only for the
 400£.

Allyp 93.
 Steep. 238.
 Allyp 33.
 3. Kelle 133.
 D. 170. 130.
 4. Bacon 2300.
 Steep. 145.
 E. 16 610.
 Jones 148.
 By two decisions the Carrier is made
 liable for the misfortune of the contents of the box
 unless he discharges himself by a special ac-
 ceptance. But these decisions are not now law
 and are overruled. Note 7th

A special acceptance is an express
 contract between the Carrier and the Bailor
 how far the Bailor shall be liable and to
 make this special acceptance it is not neces-
 sary that it should be any personal contract
 between them for if a Carrier takes
 his goods, and he is employed the law will

will say he was employed as the carrier to be
 liable. But this is not always so for if the
 Bailor has never seen the items, nor knows their
 contents the Bailor shall be liable.

46 Bk 298
 85 Bk 331
 Note 8th

A master of a Stage Coach who takes
 fare for passengers, and not for the baggage is
 not liable for the baggage if lost for as to this
 he is a mere *Mandator*. But if he did take
 fare for the baggage, and the owner is in the
 same Stage the master is not liable as a *Comm.*
Carrier who he may be in some other character.

2d Shaw 288
 Const 25
 Falk 282
 Baly 870
 1st Bk 343
 But if he receives
 fare for baggage for
 carrying goods he is
 then a *Comm. Carrier*
 and liable as such.

It is not necessary in order to subject the
 Bailor that he should have received his fare
 before he carries the goods, nor is it necessary to
 prove that the Bailor has promised expressly,
 to pay for the loss implies a promise and a
 warranty may be had on a "quantum meruit"

1st Bk 343
 Bun 343

But neither is it necessary in order to
 subject him that the goods be lost "in transitu"
 for if he leaves them at an ^{open road} *stagn* where the
 usage is to deliver them to the Consignee he is
 liable if they are lost before the Consignee obtains
 them. i.e. he is "prima facie" liable but of the
 custom was to leave them at an Inn and they
 should be lost before the Consignee gets them
 the Carrier would not be liable and if there is
 a custom either way he is "prima facie" li-
 able, and the onus probandi lies on him.

Wilson 439
 2d Bk 410
 Corp Dig 623
 4th Bk 281
 Corp Dig 83

Note 9th

The action brought is on the Case* and not
 Trover. For there has been no loss, only a
 nonfeasance. This is a Case on the
 Case may, sound. "ex delicto" or "ex contractu"
 whether he was guilty of misfeasance or not.
 Trover will not lie for a nonfeasance though
 it will for a misfeasance, as destroying the
 goods. Breaking open Trunks &c. &c.
 *when the loss is
 not by his own
 negligence
 Talk 685.
 Hoag 257.
 D. 207.
 8 B. 282.
 8 C. 146.
 3 C. 52.
 1 W. 282.
 2. 2. 319.
 Hoag 247.

Indictment The delivery of Goods to them
 seems to come under the second Class of
 the fifth kind of Bailment. As to delivery
 of Goods to a person exercising a public
 employment to have some work done with or
 about them for a reward.

5th. This kind of Bailment is called
Mandatum. The person to whom the
 Goods are delivered is called the mandatary.

This differs from the last kind only that
 here the Bailor has no reward. The duty of the
 mandatary lies in Custody, he is to keep the Goods
 the duty of a mandatary is to do something to the
 Goods.

As this Bailment is created only
 gratuitous to the Bailor. The Bailor is liable
 only for breach of good faith, i.e. for gross
 neglect.

There are certainly some distinctions
 in particular Cases that are recognized in
 the Case of Coggins & Bernard

2 B. 413.
 1 B. 73.
 1 B. 255.
 1 B. 158.
 2 B. 904.

Janey 75. But when a Mandatory agrees to keep
 Edw. 909. thing with due care and still he makes
 Bond - 23. himself liable but it is on his mere voluntary
 stipulation and not mandatory.

This was the precise case in *Gregg* and
Barnard. in that case there was an express
 promise to carry and deliver the goods safely and
 Duff was not charged with blame but with
 neglect.

3 Moir 153.

1 Moir 158.

Op to 162.

This is a question
 whether the
 is broken down
 or not and the
 and the different
 degrees of negligence
 in the case of
 Bailments.

A question has arisen whether an ex-
 press promise by a mandatory is binding on
 him as a contract or for neglect. - Gross neglect
 in one case is the same as in another and
 Lord Mansfield is insistent in *Green v. Bickerton*
 where he lays it down that a negligent
 neglect is gross neglect for gross neglect is essen-
 tially the same. By the condition of what man-
 datary in *Gregg* case is the regulation of his affairs.
 The Mandatory is then liable on his contract says
 "Gould" - when he makes a contract, and not liable
 on the ground of gross neglect.

Janey 114 20.

Edw. 909.

Edw. 909.

Edw. 909.

Edw. 909.

The difficulty here has been on the ground
 of no consideration. But *Edw. 909* says stipulation
 itself is sufficient consideration for it the Bail
 Contract. - It is not saying he agreed to it is a disadvantage
 to the Bailor and this is consideration enough
 in every Bailment.

Janey 73-4. Jones makes a distinction
 and says that the duty of a Bailor is greater in
 the case of a person than in the case of a thing.

Because the nature of the thing implied it and
 because more care is necessary in carrying from
 place to place than in simply keeping the same
 that the liability of the depositor is greater
 than that of the deponent. - But this is incorrect. *McK. 158*
 There is no judicial decision to this point but
 it is noted that where there is no express agree-
 ment the depositor is never liable beyond
 gross neglect. That Jones says he is.

Another well known idea in Jones is that
 a bailment to carry from one place to another *Jones 87*
 without hire is different from a command to
 labour without reward.

When the act to be done is in the line of
 the Bailey business he is liable for a want of
 all necessary care. But this means all necessary
 on the feasance of the thing, and not indur-
 tion to external things, it is providing against
 the acts of others. *Sola Taylor engages, No 10*
 all necessary care in making up clothes but *Drury 910*
 this does not extend to the keeping. - As to the *Black 123*
 making he is mandatary, as to the keeping he is *Jones 145*
 a depositor. - This engagement does not extend
 to foreign causes if the garment is lost or made
 he is liable but if it is stole he is not if he
 has used due diligence. *McK 255*

It is to be observed that
 the liability may be qualified or limited by agree-
 ments both within the mandatary nor the depositor *substantis*
 can exempt himself from fraud by any, *supra*

Special agreement such contracts are
"Contract for more,"

Some Gen. Rules as to Bailments.

As the Bailies lie upon the Good Bailie
Voluntant 178. a Lien properly so called exists only as to the
Crops 241. fourth and fifth. Clauses of Bailments in
Salk. 532. for a lien is a due claim to or incum-
brance upon some specified property by way
of some debt and it is doubtful whether
it will hold good here though it does in the
fourth because the object of giving the power
is giving a lien upon them as a security for the
debt due.

Most of the fifth class have a lien because they are no better laborers on than in many cases and this lien in the fifth head is one of the 42nd or exists by virtue of a condition in the 185th article by, E. A. B. But if the balance would be just in retaining more than would be sufficient to satisfy the reward.

3 Case 385.
2d Pl 485.

If therefore a lien exists in favour of the
Bailor a third person who obtains possession
of the goods wrongfully from the Bailor
can't take them subject to this lien, and they
may be recovered without tender to the Bailor
and without due notice. But it is otherwise when the
possession is obtained leg. ally, for then it would
be necessary, in order, ^{to the Bailor} to redeem, there
can be no assignment of a lien tho' it may be re-
leased to a third person who bids for the Bailor.

A receipt good for a week to be paid
 in 4 d. since the B has a lien upon them. 103 Bath 85
 he can hold them against it but if they should. 104 Bath 85
 come into the legal possession of C A could have. 25 Bath 85
 no action while detained and refused upon the B. 188
 and the principle that a lien is not assignable

A carrier carries a lien on the goods
 which he carries. one of the Goods of A are wrongfully
 taken by B and given to the carrier for transport
 then he does transport them the carrier may
 retain the goods both against the Bailor and the
 owner and therefore the same if the goods were. 20 Bath 85
 stolen and given to the carrier he may retain on. 21 Bath 85
 them he is retained for his trouble the reason given. 22 Bath 85
 is that the carrier by law is obliged to carry the. 23 Bath 85
 goods but this would seem not to be the true rea- 24 Bath 85
 son for he may insist on his pay before he trans-
 ports the goods the other not customary to pay in
 advance.

The Tithesman may retain the tithes
 if his grant from the House of B is not for his
 present tithing, but he may retain the tithes
 if his grant, unless he has paid all his tithes. 25 Bath 85
 26 Bath 85
 27 Bath 85
 28 Bath 85
 29 Bath 85
 30 Bath 85

This rule as to carriers applies to tithes
 if any horse is stolen and put into a stable
 or stable he has a lien on him even against
 the owner. 31 Bath 85
 But if the Tithesman volun-
 tarily lets him go even for a moment his lien

See page 30 is last for an abandonment is also fact, as
 Supp 587: setting out with of the defendant, and the same
 Dec 587: is found if he lets the property of his just good
 Supp 584: if he does he can't release him, and this rule is
 1800 443-44: same of all persons who have a lien on goods as
 1800 443-44: factors &c.

See 1800 443-44: 362. To wit a man or other mechanic
 for a time employed to make him he has received
 800 147: his money or wages. The principle reason of
 1800 443-44: 362: being why an owner may recover does not
 1800 443-44: 362: apply, this is a fact and it is not by law bound
 1800 443-44: 362: to make a garment he may refuse it if he
 1800 443-44: 362: pleases. The true reason is that the owner
 1800 443-44: 362: would require that he should have a lien.

I should doubt says it is found whether a
 1800 443-44: 362: tailor who has been in the habit of giving credit
 1800 443-44: 362: could hold this lien, unless he gives notice that
 1800 443-44: 362: he will depart from his custom any day.

But an existing law is a law for
 1800 443-44: 362: his compensation, and the Court said that
 1800 443-44: 362: because by law he is not bound to receive
 1800 443-44: 362: them. But the true reason is Commerce and
 1800 443-44: 362: Trade must require it.

1800 443-44: 362: The Master of a Ship has a lien on the
 1800 443-44: 362: Ship for his services or for the repairs his
 1800 443-44: 362: contract is with the owner, and his demand
 1800 443-44: 362: is on the ship, and not on the cargo. But the
 1800 443-44: 362: cargo has a lien on the ship, and the cargo
 1800 443-44: 362: has a lien on the ship, and the cargo has a lien on the ship.

The Law implies a Lien. But in any case
 a new way, good a Lien & or a Lien may
 be created by express stipulation where the Law
 gives none and Contract - a Lien may be was-
 ed by express Contract. Thus the Law implies one. *Exp. Dig* 585
 for the Law will not impute a Contract where. *2 Rolle* 92
 the parties make one. So a Lien is gained both by express
 a House to come of some discord and the Law. *3 Bac* 271
 was agreed upon it was held that there was no
 Lien upon him for there was an express
 agreement that he should have so much.

A Factor has a Lien implied by Law on
 the Goods of his Principals not only for a Lien
 and but also a Lien of Lien. *1 Rolle* 382

2 Rep 1154
3 Bac 404
1 Rolle 254
1 Rep 110

But he want neither his Lien nor another
 nor can he create a new Lien in favour of
 another in the Goods. This right is of Lien
 and that is one of all Bailies.

3 Rep 601
1 Rep 1178
1 Rolle 302
1 Rep 260

The Bailie of the first kind has no Lien for
 he has no Compensation nor has he Bailie of the
 second kind for he is bound to deliver up the ar-
 ticle on demand but if an article is bailed for a
 limited time he may retain it till the time
 has expired but that is no Lien. The Bailie of
 the third kind may retain the property for a
 long time for which he was bailed but it
 is no Lien. So a Mediator, or a Bailie of the
 third kind has no Lien. He is a mere volun-
 tary and needs no Compensation.

1 Rep 172
1 Rep 500
1 Rolle 125

In this case it shall be a bill of sale under
be a delivery of the ship. - *Quere* if the con- *Value 865*
dition be subsequent, as where goods are mort- *25th Feb 453*
gaged while the ship is good remaining in pos- *D. - 468*
session being the case within the Stat. 14
James 1st 2nd In the next page * *not at 5th page 397*

This Stat^{ute} of 13 Elizabeth relates *Locum 434*
to Creditors and is in affirmance of the Law *36th Feb 83-8*
Ed Coke says it is in affirmance only, as to *De Dec. 60*
prior Creditors but Ed Mansfield says it is as *17th Feb 290*
to prior and subsequent Creditors. *40th Feb 354*
Feb 2nd 364

+ Want of immediate possession when made *25th Feb 340*
is an absolute bar is by some authorities *D. - 471*
more so in fraudulent *page 45* *Vol 5th 395*

This rule is certainly questioned I find
but one case where it was held in Edwards vs
Hord, in Term Reports - It is a bill of sale a
conveyance of fraud, and so it was claimed in
Hewes Case and Ed Mansfield in the last
of Cases Reports questions the authority in
the case of Edwards vs Hord. *+ There has been much*
litigation between
Wharton and the
editors of the 5th
edition. He
thinks it is a mat
ter of mere rule
and to determine
the question will
be 5th 396

Our Superior Court have decided that it
was only a conveyance of fraud till lately when
they held it was now so - This ques-
tion is now before the Court of Errors. *+ Vol 5th 396*

Another English Stat^{ute} 2 James 1st
provides that if a Merchant has the goods
of another in his possession or under his
control

Law 365 & 366 by the latter Count they shall
 be considered as bona fide, as the Bankrupt
 28th Feb 82. and may be taken for his Debt.

Case 503th
 Note 12th This Statute extends to all cases where
 Case 232 the Bankrupt has property by the owners own
 Bank 82. debt it is immaterial how he became possessor
 Case 504 signed if it was with the owners consent.

Veru 364 The creditor of the Bankrupt Bailor has
 Case 374 a right to take the goods on the ground of
 Case 508 a debt credit and not that of bailor.

Note 13th This Statute does not extend to goods sold
 Case 159 settled by the Bankrupt in the right of another
 Case 164 as if he sold as agent or as a proprietor
 Case 648 as if he sold as agent or as a proprietor
 Case 192 as if he sold as agent or as a proprietor
 Case 202 the is affixed no proof of ownership, and hence gives no false credit.

* This Statute extends to all cases, as
 Case 165 where as to an absolute sale of goods by the
 Case 348 Vendor remains in possession and becomes
 Case 500 a Bankrupt, for then is false credit held out
 Case 508 and
 Case 397.

This Statute does not extend to a ship sold
 at sea but it has been held that it is
 inoperative if the purchaser is a bona fide
 Case 168 possessor immediately in possession, and if
 Case 361 he does not own the ship becomes a Bankrupt
 Case 462 and she will be liable
 Case 485 and
 Case 500
 Case 502.

And in many other cases it is not necessary
 that there should be an actual manumission
 before the case can be taken out of the Statute.

for under certain circumstances as for
salica & co. is sufficient. Thus if a cargo of
or Lord of Goods are sold and delivery of the Goods
on the day to the Lord is sufficient it is a conveyance
a conveyance of the Goods

The Bankrupt at the time of becoming
such must be in possession and is pos-
sessor of the Goods. He must have such pos-
sion as must make him appear to be the
owner of the Goods. and he must have the consent
of the owner. So that a temporary possession for
some special purpose will not being the case
within the Statute as finding a House to a
Bankrupt to go a mile that is not within the
Statute. So also if a man should leave his horse
and leave him at an Inn and should get another
if the Innkeeper should become a Bankrupt
that horse could be taken for this is not suf-
ficient evidence of ownership. and not even if
the Innkeeper should use him without consent
of the owner expressly given.

Bankrupt 82
P. 318
D. 185
M. 185
Cooper 233
W. 114
D. 400

It follows then that if the possession is
such as to rebut the presumption of owner-
ship the true owner will still hold

Bankrupt 183
P. 318
Bankrupt 82

If a Factor or Goldsmith becomes a Bankrupt
must still the property belongs to the creditor
and this must be the natural presumption

P. 380

The Statute of 13 Elizabeth and 21 James I.
are in favour of Creditors and not Purchasers

There is no
evidence of his
intent that he
should be a
creditor. Hence
no sale of his
goods is
valid unless he
has been
adjudged to be
a bankrupt

Case 434

By the Stat^{ts} of Elizabeth the same
provision is made as to Purchasers and
hence the rules above laid down must apply,
to them, if a Creditor can hold a purchaser can

* is not the
possession of the
disposition of them

But it is necessary to take notice of some
cases that do not come within either of these
Stat^{ts}. - Suppose a Bailor is not a Creditor &
Goods * are become a Bankrupt then the rule

William 8.
2 S. 1187
3 S. 44
Salk. 283
2 S. 376
4 S. 640
In this case
Creditor is
in the debt
does not
know a
rule costs
to establish
In Salk. 44
as to the
great principle
this subject may
be found

is the true owner the Bailor is entitled to the
Goods, against any Creditors or Purchasers, un
less the Goods were sold in market overt &c.
It tells his House to B. & D. tells him now it
means take him from the Purchaser, and
if he refuses trover will lie against him.
and this is Law in Conn. - and the rule is
the same if the House is taken on Execution
or sold at the Court. Here it means take him
the meaning of Law with us is not to be protected is "Caveat emptor"

3 S. 150
Salk. 485
Burr 452
Salk. 120
2 S. 335
3 S. 511
It would be
in the nature of
the Statute
and is
the Statute
which is
the Statute

There is an exception to this rule when
the property bailed is a Horse, Cart, Wagon, and
other things which pass for money, this is
founded on principle of policy, there a reg-
ular and "conveyed" is made by the Bailor
and "not" in market overt bailed property.

In Conn^{ts} our Stat^{ts} as to fraudulent
conveyances is the same as the English Stat^{ts}.
We lose no Stat^{ts} like that of Land 11th Ed.
the principles are the same in relation to
Bailments, so in other respects are similar.

to those that obtain in England Note 14th

When the goods are left with the Bailor
to keep until the warehouse can hold them M^o 185th
against the Bailor because they are not E^o Dig 36th
within the order and disposition of the Bailor Cooper 333
and then each be sold without a notice Sedwick 197
of the terms of the Bailment. D. 200th

When the Stat of Elizabeth the 1st page 41
says that of Grand Court be called Dough 32
The Law would proceed upon a more rational W^o Rep 70
and punished if they obtained it if one of D. 25 175
two innocent persons suffer by the knowing Kear 300
guilt of the one who enabled him to do the Note 15th
wrong, should be the sufferers

If goods are bailed for time to be used by
the Bailor for a certain time it is a question W^o Rep 11
if the Bailor creditors can take the use in D. 12th
Eq^{ty}

It would seem from a dictum in this
case that it might be taken that it is not Supra
a personal right and one which can pass Note 16th
from the Bailor. I think it is sayable Note 16th

Construction of possession means a right
of possession
It bails a horse of Green to B
for six months for hire and B. can use the
horse in Eq^{ty} for the time during the six
months and B. has the horse in possession, is
it an affirmation? There is a distinction

75. Dec 11-12
Noted
point

Supp. 21

between specific words in real things and
a general Chatter. - It may be willing to
showed that his & given and some one analogy
of Law is in favour of this. Thus a case of a
Lawrence for which this expression is given, was
said to be a flaming Contradiction. Suppose a
man lies a horse he is to go to law can
his business attack and side with it. No
view of a thing can be taken in Gt.

What actions the Bailor and Bailee
have against each other and a Stranger.

Sal. 214
Debut 208
Bailor 4
38 Bac. 104
Debut 208

Generally the Bailor may maintain an
action against any one who injures the goods
while in the possession of the Bailee
for the Bailor has the property in them.

And the Bailee if he has bailed to the
third man maintains an action against the
wrong-doer. And the wrong doer acts as if he
bailor's goods were deposited with him.

Sal. 214
Lind. 438

It is a rule of law that if a man
bails goods to another and before he should get
them back they are injured or lost he shall not
recover.

Note 17

Suppose the Bailor has bailed to the
third man and the goods are injured or lost
before they are delivered to the third man.

That an action
will not lie
for a bailee
if he is not
negligent

And the Bailor of goods in his possession
shall not be liable for the loss of them unless he
is negligent. Constructive negligence is a kind of
negligence which is imputed to a person when
he is not actually negligent but his conduct is
such that it amounts to negligence. If a man
bails goods to another and the goods are lost or
injured before they are delivered to the other man
the Bailor shall not be liable for the loss or injury.

in trespass or trover, a Stranger for taking
them away or injuring them during the time
because for that time he has no right of prop-
erty

If the goods of one man which he had
in the possession of another are given to a third
person by fraud without his consent, and
a Stranger afterwards takes them away or
injures them before the Donor gets possession the
Donor can sue because he has no other remedy now
constructed by law for a fraudulent gift - alone
but with a title. If it is not a title it will not
amount to a delivery, as the delivery of a key
or a delivery to the Donor's servant.

If the Bailor gives away his goods to a Stranger
and the Donor in trespass or trover the Stranger
cannot sue in the first and not in the last
and demand of the Donor and proof of his own
wrong, unless he has done some wrong or
else there is no conversion. But if the Donor re-
ceives the goods from the Stranger or before he suits the
action stops.

The Bailor may sue in trespass
or trover for full value any Stranger.

There is some question as to a Dependent,
as in Southcott's Case.

The ground of the Bailor's right to maintain
an action is said to be his own title to the goods.

15 Rep. 480.
13 Rep. 58
Esp. Dig. 570.

15 Rep. 480.
13 Rep. 58
Esp. Dig. 570.
contra
page 461

15 Rep. 480.
13 Rep. 58
Esp. Dig. 570.
15 Rep. 480.
13 Rep. 58
Esp. Dig. 570.

15 Rep. 480.
13 Rep. 58
Esp. Dig. 570.
15 Rep. 480.
13 Rep. 58
Esp. Dig. 570.

15 Rep. 480.
13 Rep. 58
Esp. Dig. 570.

13 Coke 67. Hence it has been questioned if a Deputy Bailiff or
 5 Bac 114. Mandamus, under a Great Seal, can maintain
 12 Mod 380. an action for a writ.
 5 Bac 114. D^o - 165. But it seems that any Bailiff may bring
 these actions, and it is only when he takes the
 12 Mod 380. name of the Court, that he is considered as a
 5 Bac 114. Justice of the Peace.

12 Mod 380. Again, Bailiffs have a special privilege
 5 Bac 114. in the King's Court and if so the Court will pro-
 12 Mod 380. tect him in the execution of his duty.
 5 Bac 114. D^o - 165.

Secondly. It is well settled a more binding
 * 12 Mod 380. action may be brought against the
 5 Bac 114. owner of the goods, if they are taken from him, and a
 12 Mod 380. general interest is not protected than that of a
 5 Bac 114. Deputy Bailiff.

Again, it is settled that if a servant, with-
 out any default of his, is robbed of his Master's
 goods, he may maintain an action against
 12 Mod 380. the thieves under the Statute of Winton.
 2 Mod 404. or an appeal of robbery against the robbers.
 * 12 Mod 380. Linnell, but yet the servant is not obliged to his
 13 Coke 67. master. The liability of the Bailiff over to the
 * 12 Mod 380. Bailiff is not the same reason why he may sup-
 5 Bac 114. port an action. See also the case of a Deputy Bailiff, D^o 33.

Again, Bailiffs may sue without any special
 12 Mod 380. application, but a special privilege is sufficient for
 5 Bac 114. holding their office.

And it has frequently been held that an
 unqualified Bailiff, after an act of

of Bankruptcy may maintain an action against
any wrongdoer. He takes the property
But only if the liability occurs on the true ground of the action the Conclu-
sion that the Defendant cannot be maintained it would be incorrect. It is
The Defendant may be liable over to the
Bailor for the wrongful act of another or he may
not * and so of a Com^o Carrier. So that liability
of the Carrier over to the Bailor is not the
ground why he can sue the wrongdoer.
You can't go into the enquiry if the Bailor is
liable over to the Bailor then the Bailor sues
a wrongdoer this is a thing that can't be deter-
mined in that action. *

Bank Act 44
75 Reg 391

* According to this
rule the Bailor
may sue the
wrongdoer and
the Carrier de-
termine that these
two would not lie
because the Bailor
was not liable over
to the Bailor and the
next day the Bailor
might sue the Bailor
and the King deter-
mine that he was
liable.

Further - Policy requires that the Bailor
should have that action for I suppose I
should deposit goods with a person in London
now I am at a great distance and a speedy
remedy is required and if the Defendant can't
maintain the action I may lose my goods
I am therefore fully convinced that a possessory
possession will give a right of action against
all but the owner of the property.

Regard Eng^o

And as to the Bailor, deliver goods
to a stranger who is a stranger may have an ac-
tion against a third person who violates his
possession and if a stranger is nothing more than a Defendant
An Auctioneer may maintain an
action in his own name for goods sold by
him on a contract as Auctioneer and not as
the Purchaser. Hence the goods belonged to
another.

Bac^o 200.
100 242.
Rolle 007.

116 81.
200 391.
31 80 130
101 363

As the same is implied in *Lect. 10* the
Remedy is known may sue.

In many cases the Bailor or Bailee may sue
 13 Coke 67 said these actions - the Bailor is sometimes sue
 3 Bac 103 and as I have noted for want of respect
 D. 253. action or constructive as when he has bailed
 the goods for a certain limited time. There can
 never be but one recovery of the full value for
 the same thing. Hence a recovery in trover would
 be a trespass.

And as said in *Rolls* that
 if both commence an action against the
 2 Roll 509 wrongdoer, he who first recovers shall sue the
 other of his co-claimant.

It would doubt the courtship of this
 Salk 127 rule and thinks the commencement of an ac-
 3 Bac 5 tion by one may be pleaded in abatement
 by the other.

2 Roll 127
 2 Roll 58. If the Bailee recovers of the
 3 Bac 245 wrongdoer he can't then recover of the Bailor
 for he can have but one satisfaction.

3 Depins 124
 4 Depins 310
 4 Depins 243
 Salk 11
 1 Depins 401
 2 Depins 873
 3 Depins 110
 4 Depins 110
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rescuers, or the Sheriff, and of the Commencement his
action against the rescuers. It has an action
against the Sheriff.

Buttong 82
3 Coke 446
D. 32

It has also been
so decided in the case
of a husband of property
when the husband has
withd. and of course
both Master & Ser-
vant had a right
of action. See
Lalch - 127.
D. 329.

But Contract is the Bailee Commences
his action against the wrongdoer. He then makes
himself liable to the Bailor for T. & C. on the
ground that an action commenced by one is a
war to that of the other. Thus suppose the
Bailee was guilty of negligence and consequent
to he would not be liable unless he had sued the
wrongdoer. The commencement of an action
by the Bailor for full value deprives or bars the
Bailee of his right of claiming one for the same
thing. Yet it does not prevent the Bailor from
recovering of special damages because the Bailee
may have sustained damages to a great amount
thus A bailes his ship to B. and B. freight it
and is taken by a steamer. Thus A can sue the
steamer for the vessel, and B for damages for
perhaps he has lost a good vessel.

35 Rep. 63.

Thus far of actions against Wrongdoers.

An action will lie against the Bailee in
behalf of the Bailor for taking away the thing
bailed before the specified property is returned.
The proper action is on the Case for Trover, and
not assumpsit against the carrier since they
are founded on the liability of the Bailee. I
But this does not cover the case of Mandamus
and Deposits, for the Bailee may Countersuit

page 402

13 Coke 60 The Bailment at any time I can
 5 Bac 185 I can have Goods on Trespass. Coke's better
 Qo -- 280 days otherwise. The right of the Bailor is
 the goods in his special property the value of the thing is
 Bacon & Combs therefore not the transfer of his recovery. But
 the loss of the rest. Goods and Trespass
 lie always for the full value. Coke says Dam-
 ages may be mitigated so they may but why
 bring it for a sooner than any other way.

page 402 but it is competent to give the value in evidence
 the rule of pleading is that the declaration
 must state the true value yet that it is in-
 competent to prove the value.

Note 19 If the Bailor delivers over the property to
 another Contract for the Bailor's use the latter
 may bring Trover for it a Conversion and
 in this case no demand is necessary.

Cent. rule. The Bailor regularly
 can maintain no action against the Bailor
 but an action on the Case for negligence
 Cro. Jac. 244 Trover for converting to use or in other Case
 Bac 237 a stipulation or an implied promise to re-
 turn the Goods. A stipulation is generally con-
 1 W. L. 282 current with the other. But Cont'd
 2 D. 319 The Bailor can't regularly maintain Trover
 3 Case 32 against the Bailor because his possession
 Cro. Jac. 781 was originally lawfully acquired.

8 Cope 140 If however the Bailor delivers the
 1 Inst. 57a thing to the Bailor as if he had a horse which he
 3 Cope 113 has
 2 Inst. 405

has been. The fact will lie against B. M. 30th 140-6
 Could suppose it must be a voluntary act. 2 Root 555.
 sub vol. 1, 309.

As to the right of Factors and Bailees
 against Strangers - If the Vendor of Goods
 orders that Vendor to send them by a particular
 place conveyance or tells him how to send them
 he must bear the loss if any, thus should be
 the Vendor and not the Factor is the person to
 bring the action. because he is liable to the
 Vendor for their value. 2aw 102-3
 Cooper 344
 D. 246
 vol 4 83

Contract If the Seller himself sends the
 carrier and looks upon himself as sending the
 goods to the Vendor. he must bear the loss if
 any arise.

When the Vendor sends his carrier
 and thereby subjects his goods to be lost the
 Vendor is excused on the ground of privacy of
 contract.

Inkeepers.

Inns are Public Houses
 for the entertainment of Strangers or Travel-
 lers the Master of the House is called the Host
 and the person entertained the Guest.

By C. 2 any body may set up a House
 of entertainment under certain restrictions.
 in this County Inns are regulated by Statute

By the 12th Geo 3rd they could not pre-
 vent such houses from being kept yet if they

3 Bac 178 9
 48 Com 168
 2d Cal 174
 Cro & Cha 549
 1 Rolle 84

Ex p^a 449 Because too numerous they might be restraining
 2 Roca 84 or suspected and the Host might be fined or
 1 Killo 500 indicted

A Doubled House is different from
 1 Sutton 99 that where liquors must be sold - the latter
 1 Salk^e 45 is regulated by Statute 5 & 6th Edward 6th -

It was once certain to involve a peculiar to
 1 Salk^e 45 In common houses of the Hosts effects
 3 Bait 7, 27, 28 within the outer door or window he may guest
 open the inner door - but the inner room
 of an Inn can't be broken open to execute a
 civil process the rooms of an Inn are so
 many, separate situations.

It is the duty of the Host to entertain
 1 Coke 87 Strangers and to furnish them with every
 3 Bait 180-1 necessary accommodation

If a Host suspects the ability of his guest
 he may refuse to entertain him but if he
 1 Killo 500 does hee compensation is tendered him he can't
 1 Bait 158 refuse and if he does the Traveller may sue him
 and so he is subject to a public and ill name,
 for it is a public offence

The Host is obliged to furnish his guests
 at a reasonable price i.e. as much as the
 1 Coke 87 usage has ascertained to be sufficient. If he
 1 Salk^e 18 overcharges he is guilty of extortion and an
 1 Bait 388 action lies to recover it back the Host for
 1 Bait 158 may, for that be indicted
 1 Bait 389
 1 Bait 389

If the Host furnish the Guest with bad liquor he is liable in a Public and private suit. Wolfe, 95
But his care and oversight does not extend to the person of his guest, in he is not liable for calling committed upon him. 8 Coke 32

It may be asked if the Host is obliged to furnish every thing his guest may want? and this point there is no case in the books.

It is clear that if the furnishes him so that he get drunk he is liable for keeping a disorderly house. The Host must judge of this at his time.

In an action against the Host for not entertaining, it is a good defense that his house was late, the particular situation of his family, or sickness &c. will also be a good defense. Slight indisposition or small inconveniences will not be a sufficient excuse.

By Com Law. an Officer might impose a fine on the Host "volens nolens."

The Host is bound to take the Horse who the Traveller want to put up with him as where a man puts his Horse at a Tavern and himself lodges with a friend here the Host is bound to take the Horse. but not any baggage unless the person accompanies it. Salk. 388
Moore 800
De Busslow 204
Do 254

The liability of the Innkeeper in case of a loss is the same as that of a Common Carrier. They are liable for all losses except by the act of God and the public enemy and the owner. contn.
supra page 52
Jones 133-5.
Note 20.

If a man puts up with his friend

8 Coke 33^a and the House is broken open and robbed he
 37 Rep 276) has no remedy against his burglar but this is not
 Dyaw 190 do with the keeper and the ground is policy
 Note 21

Saleh 197

Dyaw 190

Dyaw 190

Dyaw 190

Dyaw 190

Dyaw 190

Dyaw 190

Dyaw 190

Dyaw 190

Dyaw 190

Dyaw 190

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If a thief in a house should be struck
 with lightning and his goods destroyed
 he would not be liable but if it should be
 broken open and robbed or burnt by a ser-
 vant he would be liable for he is bound to pro-
 vide honest servants.

These reasons which may be given for
 not entertaining will not avail any thing

in case of a loss provided the guest was

actually received. If a thief is a

servant and his servant must find it is all

the same.

There is one case where the

host is excused tho' the guests goods are

lost. viz if one comes to his house and he

tells him it is full but the guest answers

that if he will take him he will shift for

himself. He for the same reason as to the

host tells the guest to put

his baggage in a certain place etc. he will

not be responsible tho' the host is not ex-

cused if the goods are stolen or lost at least

the current of authorities make him liable

it is however a "Quod non exat."

Where the guest would not have them

in his room it was held to be no defence for

the

for the Horse if they were stolen

If the Host commits the Goods to his Guest and tells him to look them up in his Chamber still he will be liable if they are lost or removed to the Count of authorisation. It is however a question of fact.

The Law on this Subject is very strict and so Police requires it to be

If the Guest is lodged in a Stranger or fellow Traveller who the Guest requests should sleep with him the Host is not liable.

In the case of a Traveller he must actually be his fellow Traveller or Companion and not one whom he accidentally meets with on a journey. In the case of the Stranger it is sufficient if the Guest requested him to sleep with him. Otherwise the sleeper is liable at all events.

If the Guest does not inform the Host of the articles committed to his care still this does not remove the liability from the Host. But if he misinforms the Host the Host is excused as to those things of which he has been misinformed. So if the Guest tells the Landlord that his Portmanteau contains two Shirts when he has only one the Host is liable for the Shirts only.

If the Horse by order of the Guest is sent to graze and is stolen from the pasture the Host is not liable as Intereferer. He may be as Bailed on the ground of default for having a poor horse or none at all or leaving a dangerous horse.

3.3.1830 - 1830
8 Coke 33
Centon
Dyces 200
Moore 738
Moore thinks
he is not liable in this
case. He is subject
to the Guest's work
to be the trustee of
precaution to look
his own horse to
be sure the loss
8 Coke 33
Dyces 235
285
3.3.183
Esp. Dig 827
Groff 189
Dyces 224
8 Coke 33
Jones -
8 Coke 33
Moore 158
8 Coke 273
Moore 158
Note 214
Bulter 73
8 Coke 30
Wheller 4
Dyces 235
3.3.181
Note 22

The man who can claim these rights is a
 Guest. * A Guest is a person on a journey,
 or one who has come to the end of his journey
 8 Cohe 371. an inhabitant of the same town cannot be a
 1 Rolle 3. Guest. Hence if the Landlord should invite
 2 Munn 270. his neighbour to sup with him and he should
 * He is a guest only for the night & day
 2 Cohe 371. stay all night and be obliged still the Land-
 1 Rolle 3. lord is not liable.

* If a guest be made to stay at an Inn and the
 1 Rolle 3. owner puts up with his horse at his friend's the
 2 Munn 270. Host is not liable as before, but if he had
 1 Cohe 371. left his horse there he would have been liable
 1 Rolle 3. there. And he is liable only for the day.

A man at the end of his journey stays
 1 Rolle 3. at an Inn for weeks and days though paid. He
 1 Cohe 371. is considered as a guest - and the Landlord is
 1 Rolle 3. also "Secur" - He is considered as a boarder -

A man puts up his Horse at the Inn
 1 Rolle 3. and himself designs to stay with a friend
 1 Cohe 371. the Host is liable for the Horse if stolen -

A man as a servant at the Inn has paid
 1 Rolle 3. stated the Master or Servant may com-
 1 Cohe 371. mence an action.

It does not follow from this that the
 owner can in all cases sue the intruder.
 1 Rolle 3. A man takes a horse wrongfully and keeps
 him up at a Tavern and if stolen he cannot
 sue the Landlord.

Remedy of Inkblotter.

They have a remedy which no other persons have, and that is consequence of their peculiar liability. - They also have the common remedy, where the Chest does not

In Court there is a Statute requiring them to sue directly for Reigns but at Law these are in the same situation as other Com-
modities. —

In consequence of his liability he has a lien upon the property and person of his guest. This is a common remedy in retaining is not by writ but by force and arises from the liability of the host. He can sue if he does not detain when requested. He is liable to and in damages.

This right to aid force in detaining the
 person of this guest, is a principle of Law,
 and has never been rejected. he has not a right
 to call others to assist, but should others aid
 they would not be liable in an action of a
 Assault and Battery.

A House may be retained for the expense of his own keeping, but whether or he can for the keeping of his Guest & not clear (or) appear from the authorities. See however certain that the Guest can't be taken for the House's keeping, or expenses for the House may be kept. See also page 37th

D. Rolin M^y 83.
 Gaith^{er}. 150,
 Salt^{er}. 308,
 1. Shower 204
 3. Bac^{er} 185, 0
 D. Rolin M^y 438, 1

It is said if a man goes into an Inn and leaves it without paying his bill he is a trespasser for it is 209. But what can be said. But it is if he commits some wrong act.

3 Bac. 185. If A without leave takes B's horse and leaves it at a Tavern. If the Landlord will have it out of a lien on him.

A goes to B's Tavern and puts up his horse being unable to pay. C tells him if he will deliver up the horse he will pay for his keep. This is a good promise and there is a consideration. So it is not within the Statute for A's liability ceases. If A owes B 100£ and B tells him and C tells B if he will abandon the horse he will pay the Debt now this promise is within the Statute.

The Innkeeper who receives a Horse Cant sell or use him and at C's law he might count it as a chance to him but by the Custom of the City of London when a Horse has eat out his worth he may be sold.

If the guest leaves the Inn without paying his bill he may be taken on a writ of detinue. But if after leaving the Inn some time elapses and he is not returned and he should a fine issued he cant be retained. He may be taken on a writ of detinue.

If there is an agreement that the Guest may, take away his Horse and the afterwards returns the money he retained. These rights belong exclusively to Tukekeepers.

Who then are Tukekeepers?

At Com Law no man was an Tukekeeper unless he had a sign up. But this is not, the case here. He carries on the business of a Tukekeeper it matters not as to the sign.

A man keeps a House to lodge and entertain people for a particular business he is not an Tukekeeper as one who lodges during the Court, or going near a Spring or place much resorted to, as Tubus persons.

Every State has a Statute regulating Tukekeepers - where the Com Law has not been altered it remains the same.

In Com no man can open a Tavern when he pleases. See Tukekeepers are nominated by authority of the Court and appointed by the County Court for one year.

Stat^o 840
D^o 840
Stat^o 843
D^o 843
Stat^o 843
D^o 843

He who assumes the Character of an Tukekeeper of course subjects himself to the duties of an Tukekeeper.

Stat^o 843
D^o 843

Town by being a Tukekeeper becomes Publick Misanthrope.

Stat^o 174
D^o 174
Stat^o 174
D^o 174

3 Coke 32^a

3 Bac. 182

on page 285 & 274

Jones says if the force is irresistible the
 force is assumed. Mr. Gould says if a wolf
 take the goods. It appears he is not liable.
 This case is not decisive on this point

Appendix

Note 1st

1 Ball 29

2^o 31

1 Bac. 238

Vol 2.

When the pawnor offers to make a
 tender at the time of payment brings the pawnor and pawn-
 or. The pawnor may then remove his debt of the
 pawnor not however until he has previously made
 a demand. And after one tender the pawnor is not
 bound to make another. But he must be ready to
 pay on demand made.

Yelverton 179

Litt 949

2 Levins 110

Esp. Dig. 80

Note 2nd. And even while the pledge remains
 in the hands of the pawnor unpurchased he may sue
 for and remove his debt unless there was a Special
 agreement to the contrary.

Note 3rd

But after all it may be asked
 why may not the Pawnor assign? Answer that
 his debt is a personal one and this the pawnor
 may be willing to trust him. He might not be
 to trust any one whom he should select. And whether
 into is a question that the Bailor cannot transfer
 his right. If the assignment of the pawnor were
 good then if the assignee should be or become a
 bankrupt the pawnor would lose his property.
 But in the case of a Mortgage there is no such
 danger to the mortgagee. Land cannot be run away
 with and is always liable to injury. Hence the mortgagee
 is not liable.

Note 14th Here again I must take a distinction between this class of bailments and commenda. If Silver is delivered to a Silversmith, to be made into an ornament or other utensil, this is a commenda and not a bailment. The property is absolutely transferred, and the Silversmith is liable for any loss however it happens. The reason is that by the terms of the contract the property is to be so entirely changed by fusion that it cannot be identified and of course is never to be specifically restored. This is the doctrine of Sir Wm Jones, but I know of no decision.

Now if this doctrine of "Fusion" requires any qualification or limitation it must be that until the fusion it is a bailment. But I don't know but Moore 20 that it may be considered a "commenda" in this sense it is never contemplated by the parties that the thing shall be specifically restored.

Note 5th Sir, Coke in the 1st Institute assigns as a reason for the rule that the Common Carrier, Code 89^a receives a reward. But this is clearly not the reason for when private carriers or when private Bailies who receive a reward for their service would be liable to the same same extent whereas they are liable only for ordinary neglect. The real reason for the rule is that public policy demands it. In those cases where private persons are made Bailies the parties are usually acquainted with each other and the Bailor knows whom he trusts. But Common Carriers

must frequently from the nature of this employ-
ment be trusted in strangers. Public Policy
therefore requires that they should be and were to be for
all times unless those occasions by the act of God
or public enemies. lest they should be tempted to
defraud their bailors by entering into combina-
tions with robbers &c.

But tho the Com Carrier receiving a reward
is not the reason of his liability; yet he is not li-
1848-04-04 ble to the same extent unless he does receive a re-
ward 485 ward; and for this plain reason that unless he
1848-04-04 receives a reward he does not act as a Com Carrier
even tho he is one by profession. He is then more-
over a Mandator and as such only is liable.

Note 6th But Captives by Pirates are within
the rule and the Carrier is not liable. For they are
the declared enemies of all mankind. It is not there-
fore necessary to constitute public enemies that they
be under the direction of any foreign prince or
state and authorities in the fact.

But it is not necessary that the act of God
should be the immediate cause of the loss. It is suf-
ficient if it be what in the language of metaphy-
sicians is called the "Causa Causans" and not the
"Causa Causata" thus. It is sufficient to see that.

Note 7th 2d Mandator now strongly and
plainly justifies disapproval of his decisions. And
indeed it does seem monstrous after the Carrier had
been

been received as to the contents of the box which as the case might be was the occasion of its loss. What the owner should recover the whole amount. For what the carrier was subjected for £1000. when he supposed he is merely carrying a book and a piece of tobacco. !!!

Do thing express his opinion on this subject in "Strange Cases". And the Ct of Chancery Bonels in a case reported in the 1 East. 510. - I think therefore the two cases mentioned may be considered overruled.

Note 8th Under a Genl. acceptance it is stated there is no special acceptance and no fraud the carrier is liable for what he receives. But if he accepts specially he is liable only for what he engages to carry. Page 30
He is liable as a common carrier only so far as he is D.L.R. 701
carries a reward, and he receives a reward only for what he Barthol 485
engages to carry, and he is liable no farther than even the Est. Dig. 821
loss happens. And even when the money is in a box, and he did not receive any percentage but was received as to the quantity. I think he would not be liable. For had he known the amount he would have been more careful.

And as the case may be I doubt whether he might be liable for that which he knew the box contained. For I suppose he was informed the box contained a packet of probates; and among them was £1000 in bills. When were he to leave them in a barn it would be sufficiently careful if the box contained only what he supposed. But it would be

the most gross negligence thus knowingly to leave
 Bills And the bills in this case might be pro-
 curing cause of the box being taken. - How I
 regret whether the carrier would be liable even
 for the potatoes. There is a case in 46 Bk
 156 Bk 298 where it is held that the carrier was not liable
 even for what he knew the carrier But this was
 a case of *Sturges* and *Sturges*.

Note 9th If the usage is for the carrier to
 deposit them in a warehouse of his own he is then no
 longer liable as a *Carriage Carrier*. He is then 'landed
 45 Bk 581 *Office* as *Carriage Carrier*, and only liable as any third
 person would be who had received the goods into his
 warehouse. If he mixes a receipt for storage he is li-
 ble for *goods in way* case.

Note 10th At *Ex* a Postmaster not be-
 ing an officer of government was liable as a *Carriage*
Carrier for letters and their contents. But since the
 establishment of a *Govt. Post Office* by the 12th Chas 2^d
 Postmasters have not been considered liable. He is
 now an officer of government: he makes no contract
 with the person sending the letters, but the con-
 tract so far as there is one is made with the gov-
 ernment, the postage goes to the government, there
 is no privity of contract at all between the PM
 and the sender of the letter. But it seems a rule
 of policy that the PM *Govt.* should not be liable
 for if he was no one could be found in a *Commercial*

Country who would accept the office.

And upon these principles the P.M. Genl. is not liable for the acts of his subordinate officers. 3 Wms 1443
The acts in appointing them in discharge of his duty. Salk 18
Public Officer &c. But the P.M. Genl. and his Co. are 765
subordinate officers are liable for their own default
as any other individual.

NOTE 11th It is said in some of our Books
that if one person baile the property of another the Bailee must
redeliver the property to the Bailor according to the terms of the contract, and that he is not
to deliver it to the owner. For he cannot determine
the rights of the two parties. Rollo 800
1 Rollo 237
Do - 242

But I apprehend that nothing more is meant
or should be understood by the rule, than that he is
justified in thus redelivering, and not liable over to
the owner. The rule is laid down as if it was the
duty of the Bailee thus to redeliver. But it is not
his duty, for when the Bailor would have a good
ground right, to claim them, which he clearly
has not. And I am fortified in this opinion by
"Rollo" who says that if the Bailee redelivers to
the Bailor pending an action by the rightful
owner or before such action this redelivery is a bar
to the action. But this presuppounds that a redelivery
after the action does not excuse the Bailee.

I would here remark as I have before done
that if the true owner does not exhibit sufficient
evidence of ownership, the Bailee is not
bound -

bound to deliver up the goods. But if he does exhibit such evidence the Bailor must deliver him the goods. And "Do Holt" says in the case of "Cogg & Burnard" - that if a thief steals goods and delivers them to a common carrier the carrier may retain them as to the rightful owner makes he is paid his hire. Now this opinion does not seem to suppose that they must at all events be redelivered to the Thief.

But if the Bailor in this case die his Ex^{or} must at all events deliver them to the real owner at his price. For it is said he comes into possession of the goods by the act of Law without any personal trust between him and the Bailor, and that he must therefore deliver them to the legal owner. This reasoning is extremely legal and technical and I doubt whether it would now be considered as Law.

Note 12th. We have no such Stat. But it seems to me founded on reasonable principles and to be much in a firmness of Court Law and I don't find this said in any Book.

And that contemplates only cases of Bankruptcy, &c. and indeed the Contest between Bailors and the Purchasers and Creditors of Bailors is not of much consequence in other cases. For if the Bailor is solvent the Bailor has a remedy against him for breach of his contract of Bailment.

Note 13th, It seems to be founded on the well known rule of Com Law "That where one of two innocent persons must suffer by the act of a third person, he who enabled the third person to injure shall suffer rather than the other" - 1 Mth 180

It follows then that on a question upon this Stat. the Bailor rebutting any presumption of fraud will not defeat the Creditor's right to the goods. The Stat. contemplates no fraud. I am the more particular because Cases under this Stat. are at least in argument frequently confounded with those under the 13th Elizabeth. 1 Ks 3 65. Vol 5th 396-7

Note 14th, Our Old Case considers the Stat. in affirmance of that great maxim of Com Law. "That where one of two innocent persons must suffer he shall bear the loss who has enabled the third person to defraud the other. ad See - 23 Rep 70.

Note 15th And in pursuance of this principle our Old Case has held that the Creditors of the Bailor cannot take the property of the Bailor in any Case unless the Bailor is Insolvent. However strong the evidence of ownership may be. How then is it to be supported if any one is suffering. If the Bailor is solvent there are other remedies for his Creditors and Purchasers. 1 Ks 3 82. Doug 300. 7 Rep 87. 237. 1 Ks 3 82.

To go a little farther in illustrating this Subject A question has occurred in this State where it is a practice to let Cows, whether if A lets a Cow to B, and she is taken on Ex. by a Creditor of

of B. A could move? The Ct held he could.

There was in this State before I came into practice a leading case on this subject viz. A deacon in New Hampshire employed his servant to drive cattle to New York. The lots where in Litchfield (I believe to Col. Salmaso), the Ct held that the owner must recover them from the vendee. The fact that a man is found driving cattle is not sufficient evidence of ownership.

NOTE 10th The "dictum" of Ed Henry in the 7th Term Reports 11 and 12 refers I think to the case of a factory let with the machinery. In that case the machinery is attached to the premises and may undoubtedly be taken in E^{ss}. by the creditors of the lessee or the use of it may be thus taken. But the question ^{here} is merely as to a personal chattel.

NOTE 17th And the invariable rule which you may in all cases determine whether the Bailor has a right of possession and so in Law & Construction one is the following "If the Bailor has a right at any time to countermand the delivery to the Bailee or take them into his own possession" he has in Law the constructive possession. By the application of this rule you will find that in the case of a Depository he has this right. In the case of a loan and pawn he can not until the time for which the thing was lent

is past In the 3rd and 5th kinds of Bailments
he has always the constructive possession. —

Note 18th But it has been said that the
Bailor's right to an action depends on his liability
over to the Bailor, and hence that a Depository
cannot maintain an action. Now I apprehend
here that this is not the true ground of the Bai-
lor's right of action. And if it were I think the
conclusion drawn from it would not follow. —

I conceive that the Bailor's right of action
is not founded on his liability over to the Bailor
It seems to me that the true ground is his legal
property in the thing bailed. He has by the
bailment a right of possession ag^t all the world
except the bailee. Now this is a legal right, and
absolutely inconsistent with the same right in
another. And if a person has a right he must
have a remedy for an injury to that right. This
is one of the fundamental principles of Law.
But the wrong done by the Subposition deprives me
of or injures my right of possession. I then as Bai-
lor may maintain an action ag^t him. But I
don't maintain my opinion on Gen^l principles only, for
Secondly "see Text".

Note 19th In "Coke" it is said that the
Bailor may maintain "Detinue" & recover and that
the Bailor's ownership will go in mitigation of dam-
ages. But I conceive that in all cases where it is
said

Said that damages are mitigated the Plaintiff must have
 one had a right to recover the whole amount
 As if A sues B for Goods and B pending the suit
 retires the property this goes in mitigation of dam-
 ages And in the case under consideration the
 value of the property cannot be given in evidence

It is not even a presumptive rule of damages.
 For the damage to the Bailor may be more or less
 than the value of the property. This I think is
 decided. For in no other case will Plover or Tres-
 pass lie unless the value of the property is the
 rule of damages

Case Dig 0254

Note 20th The duties of our Taker as it
 respects the effects of Travellers and from his char-
 acter as Bailor And he is I conceive a Bailor of
 the 5th class. Co. Ins. 1st considers it a Bail-
 ment of the 2^d kind viz "Commodatum" as if
 the effects were lent to him to use without any
 reward. Now how any one could ever think the
 Taker a Bailor of the second class I cannot
 imagine: they are as different as two things can
 possibly be. "Bailor" classed then with the
 1st kind of Bailor viz "Manditarius" But
 this is not correct altho the resemblance is much
 stronger than that between Taker and Bailor
 of the second class. In Bailments of the sixth
 kind there are never so parties acting in their
 public capacities. But always the private indi-
 vidual

individuals or those acting in their private capacity.
 And besides when the Bailment to the Innkeeper is
 of horses he receives a reward for those whom he is
 clearly not a Mandatary. And as to the unanimous
 effect he is not I think a "Mandatary" for he thus
 obtains another gainful contract for the car-
 rainment of the Traveller; and indeed it may be
 considered part of the Quilted Contract that his goods
 shall be taken care of for the reward which he
 pays the Host. I think therefore the Bailment
 is of the 5th kind. Being then mutually
 advantageous according to the Gen^l rule the Innkeeper
 is wholly liable only for ordinary neglect. But
 on the ground of Policy he is made liable to the
 same extent as a Comm^o Carrier: and the persons who
 he is thus liable on the same as I guess for the
 liability of a Common Carrier - as see Note 5th.

NOTE 21.th On examining this subject a few
 years since I was surprised to find the rule in
 "Robinson v. Harman" - that an Innkeeper is liable for
 all losses but those that happen by the act of God
 or the King's enemies. And I observed it to be the reason of
 that if the Inn is broken and a Robbery committed
 by public enemies the Innkeeper is excused and
 leaves us to infer that he is not without -

And says that the Roman Law was that nothing
 but inevitable accident excused the Innkeeper -
 but he does not tell us what the English Law is.

It seems then yet to be in question. But it seems to me that every reason of policy which will apply to the case of Common Carriers will also to this and hence that the Innkeeper is liable in cases of Common Robbery, who also found was such as he could not resist. And surely if it is reasonable in the former case it must be in this. For the Innkeeper being at home has much better means of guarding against Robbers than the former and could provide, and temptation to impose upon and defraud his Guest by combining with robbers to be -

8 Coke 33 It was formerly said by Lord Coke that the Innkeeper was not liable unless there was some default. But this has since been excepted over 5 Mod 271 unless by the Act of the Rob. And in the case of Smith the Innkeeper's great care is no excuse for the robbery.

Note 22nd The Innkeeper is liable as Innkeeper only for those goods which are "intra hospitium" But these words are construed to extend to the stable and out houses where he keeps his Guests effects. 8 Coke 32. And when the goods are removed by order of the Guest the Innkeeper is not liable for any loss which may ensue in consequence of it. But if by order of the Innkeeper at the Guest's house it should be taken he is liable as he has no right thus to remove without the consent of his Guest.

Note 23rd But no Injury in the Stable

A Tinker is not liable in that capacity. His privilege will protect him. For the Tinker is liable arises almost "quasi" ex Contractu and as Tinker is not liable on his Contract.

Wolfe 2
3 Bac 182

NOTE 24th This case I think is correct as to Tinker's who act as I have before observed as to a Prisoner. The Defendant is elected by the Bailor and he is not bound to use more care than he would with his own goods of the same kind. But the Guest must trust a Stranger. Hence it would not altogether be safe for a person to tell what he carried. But in the case of a Prisoner there is no ground of fear.

But as to the question whether the Tinker is liable in case the Guest injures him I take it that his liability is here the same as that of a Carrier in the same situation, and the reasons given there are equally applicable to this case. The Guest is not bound to gratify an idle Curiosity but if the Tinker asked him what is in his Basket he may remain silent, but he must not deceive him.

NOTE 25th He is in the custody of the Bailor. He is not like a pawn for there then is an implied Contract that the pawned may use him to pay for his keep, and the delivery is voluntary. Now the taking is in the nature of a distress without the Consent of the owner. But if the Case of a distress the Bailor may use the thing detained he be kept 309 Comes a Bailor "at will". The Tinker here act as an Officer of the Bailor and can no more use him than a Sheriff could use the thing taken in ex. & in a Sale.

Page 15

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Actions on Contracts.

1st Covenant-Broken.

This action is founded on a Covenant and claims a remedy for some breach of it. Hence the name of the action.

Covenants Contracts and Agreements are sometimes used as Synonyms. But they are not strictly so. For the every Covenant is a Contract or agreement. But every agreement or Contract is not a Covenant. 1 Bos 526
City L. 340
1 Paul 244
Est. Dig 266

A Covenant is a Contract or agreement reduced to writing and sealed. Contracts or agreements are a Genus. of which Covenants are a Species.

Covenants may be either by indenture or Deed poll.

If a Covenant be in form by indenture but if sealed only by the Covenantor and not by the Covenantee it will support an action. Cro Eliz 212

On the action of Covenant broken the usual remedy is in damages. But Debt may lie where the Covenant is for a particular Sum, or where the damages may be reduced to a Sum certain by agreement. Thus if I Covenant to pay A 100 Dolls or to pay him 2 Dolls, a bushel 3. Sevin 426. If he ate the wheat he will deliver before such a time Debt will lie. In the last case the damages may be reduced to a certainty by averring that he delivered so many bushels. Str 1089
Butler 107
3. Sevin 426

But the usual remedy for breach of Covenant is an action at Law to recover damages. yet where the Covenant is to do some specific Act 1 Bos 526
Hobbs 27
Coke

1406 139 Collecting act as (eg) to convey Land the most
 D^o - 156) usual and proper remedy is by a bill in Chy for
 a specific performance

But when the Covenant entitles the Covenant
 see to damages only a bill in Equity cannot ordi-
 narily be sustained. Hence a Ct of Law can afford
 156 341. a more adequate remedy. And besides damages are
 156 336) not to be ascertained by the Chancellor but by a
 1406 27. Jury. Thus if A covenants to pay B a sum
 of money or to deliver him a certain quantity
 of any personal chattel, a bill cannot regularly be
 sustained. There is an adequate remedy at Law -
 and the rule is that Chy will not interfere where
 this is the case

But in such cases if the relief is collateral
 to some ground of relief properly cognizable by a Ct
 of Equity, Chy will grant relief. As if A sues B
 at Law for breach of Covenant B has his bill for
 1406 17 an injunction on the ground of fraud. Hence A must
 156 19 file his cross bill and if no fraud is found Chy will
 D^o - 320 afford him relief. Thus A could not originally
 156 215 have filed his bill in Chy. But his relief is col-
 lateral to the fraud which by the act of B is
 before the Ct. This rule is sometimes difficult
 but doubtless expedient. Thus when the remedy for
 damages only issues, may be had in Equity if mat-
 ter of fraud be mixed with the damages. In the
 example I have given it is the English mode
 to direct an issue before a Jury to ascertain the
 damages -

damages unless they appear upon the face of the proceedings. for the Chancellor never ascertains damages. In Court the matter is referred to the question as to the amount of damages to be committed appointed by the Ct for that purpose. But if the parties wish it the Ct will estimate them

Covenants may be divided into two kinds viz Covenants in Deed, and Covenants in Law, or more intelligibly into express or implied

4 Coke 80

A Covenant in Deed is one where the Covenant is expressed in words clearly and directly as where in a grant of Land the Grantor Covenants that he is well Seised

Exp Dig 200

A Covenant in Law is one raised or implied by Law. Thus if it be said to B for a particular time the Law implies a Covenant of quiet enjoyment for that time, i.e. a Covenant that B shall have the right of quiet enjoyment

1 Inst 384
Exp Dig 200

This division of Covenants arises from the nature and form of the agreement. But there is an other division arising in a different way. viz

All Covenants are either real or personal. This division is coordinate and not subordinate to the other. A Real Covenant is one by which the Covenantor binds himself to pass or assure some thing Real, as Land Tenements &c

1 Inst 130
Exp Dig 343

A Personal Covenant is one annexed to the Person, or one that concerns the Person only.

Thus a Covenant to serve as Apprenticed or to do

5 Coke 16. 17.

any

§ 145. any act for another a Covenant to pay money to or
 to give any personal chattel to build a house &c. is
 a personal Covenant

This last division of Covenants arises from the
 Subject of them. To determine whether a Covenant
 is real or personal you examine the nature of the
 Contract. But to determine whether it is real or
 personal you resort to the Subject matter.

§ 146. No set form ^{of words} is necessary to create a Covenant
 Any words amounting to writing and sealed which show
 the agreement of the minds of the parties to the
 Covenant amount to a Covenant. Thus if A
 makes a lease to B with this clause "I reserving
 so much rent." or B saying "I must rent" that is
 considered an express Covenant by the Lessee to
 pay that Sum.

A Covenant may be made as to a thing
 past, present or to come. If A covenants to give
 any Land to B at a certain time and at the same
 time covenants that he has bought the Land of C
 when C still owns it this is a Covenant as to
 a thing past. So of the Lease Covenants that he
 has made no prior Lease tho he has he is liable
 on that Covenant.

In a grant the grantor covenants that he
 is well seized. this is a Covenant as to a thing
 present. But Covenants are generally as to a thing
 future. Indeed executory Contracts indeed Seal & are
 all generally future Covenants.

Covenants in Law differ from those in Deed in this respect. The latter are founded on the words used, as amounting to an express Covenant tho the words may not be explicit. The latter are implied, not from the words, but from the nature of both the contract or agreement. Thus from the words "demise et concessio" in a Deed the Law implies a Covenant that the Grantor has a good title and that the Grantee shall quietly enjoy tho there is not a word said in the Deed respecting a title or quiet enjoyment.

And I take it an action will lie in such cases tho before the Grantee is evicted; and this seems to follow from the bond of the implied Covenant that he has a good title. After the Grantee is evicted - 4. Co. 80. it there is no doubt but that an action will lie and both 4. Co. I conceive it will before. For the Covenant is to be taken "eo instante" in which it is made. If the Covenant were express that he was well seized, the action would lie immediately and I don't conceive that it makes any difference that the Covenant is merely an implied one.

But Covenants in Law are always restrainable by Covenants express or in Deed. The maxim "*expressum facit cessare tacitum*" is where there are Covenants express the Law will not imply contradictory ones. As if it leaves by the words 4. Co. 80. "demise et concessio" &c. and there is afterwards an express Covenant that he and his heirs shall have him.

wild with the Deed the Law will imply no Cov-
enant as to a third Person not claiming under
him. But if in this case there were no express
Covenant the Law would imply one w^{ch} the estate
of any Person who lived. In contemplation of
Law the Deed with the express Covenant amounts
only to a quit claim for the time of the Deed of the
Dehors right.

This is a rule laid down in Broke
Elizabeth. too generally expressed and which without
Bro Eliz 214 explanation would mislead. It is there said that
L. Dig 208, the word "deed of Conveyance" in a Deed imply no
Covenant w^{ch} violation by a Stranger. This must
mean a tortious violation or it is contradicted
by every authority on this subject. As to tortious
violation an express Covenant for quiet enjoyment
would not bind the Covenantor. This you will
4 Broke 80, see must be the rule by comparing it with the
other authorities on this Subject especially 4 Broke 80,

A recital of a former agreement in a Deed
3 Hble 405 creates an express Covenant. Thus if in a Deed
L. Dig 208, it be said "this indenture witnesseth that whereas
1 Deed 132 it was agreed between A and B the parties that
A should pay B 1000 Dols it is hereby further ar-
gued like this is an express Covenant by A to pay
B 1000 Dols. But in the case of a Covenant
in Deed if the word Covenant be not used there
must be some other words importing an agreement
otherwise there is no Covenant and the action of
Cov-

Covenant broken with notice As if the Lessee
 covenants to repair provided the Lessor will fur-
 nish timber. This proviso is not a covenant of
 the Lessor to furnish timber but merely a qual-
 ification of the Lessee's Covenant. At the Lessor
 does not furnish the timber the Lessee need not re-
 pair; but no action lies ag^t the Lessor for not fur-
 nishing. But if the words in the Lease had been
 "provided and it is agreed that the Lessor shall fur-
 nish to" this would have been both a qualified
 tion of the Lessee's Covenant and an express Cove-
 nant by the Lessor.

Again if I lease to A for life provided
 that if he dies before the end of 50 years his Ex^{or} shall have the Land till that time this is a Cov-
 enant and not a Lease to the Ex^{or}. It is not a Lease for a Lease must be certain as to its beginning & end. It is not a qualification of the Lease to A for life but something in addition to it. Whether the words are in form a proviso yet they must operate as a covenant or not at all. But in such cases words in form a proviso must not be construed as a covenant unless they are plain-
 ly so intended by the parties.

It is a very common practice in England for the Lessor or other Covenantor to enter into a bond conditioned for the performance of the Cov-
 enants. These bonds extend to implied as well as express covenants. Thus when A leases to B by

Rolls 518
 Ex Dig 207

1604. 155
 Rolls 518
 Moore 478
 York 27

460 80
 the.

the words "sed et Concessi," he and gives a bond and action on this bond will lie if he has not a good title.

If a Deed contains a Clause "Provided and on Condition that the Lessee does such and such." This is not a Covenant but a Condition to defeat the estate. If the Lessee does not perform the act, therefore the action of Covenant broken will not lie.

And whenever the stipulation is in the nature of a defeasance an action at Law will not lie as on a Covenant. As if A executes a Special bond to B, with condition that if A before such a time convey to B Black-acre, this is a defeasance and not a Covenant to convey such Land. But a Ct of Equity may decree a Specific performance of the Contract and order the Land to be conveyed.

Construction of Covenants It is a general rule that covenants are to be construed liberally, i.e. the meaning of the parties must be sought without too strict an adherence to positive rules as in Deeds and Grants executed and passing a present interest.

In many instances there is a clause "Per-
formances will not avoid the Covenant" it should not be considered a performance. Thus if A the obligor of a bond promises to deliver it to B the obligee on a certain day if before that time he dies and leaves upon it a delivery at that time.

time is when no performance

So on the other hand a Substantial perform-
ance of the Covenant discharges the Covenant with
it be not a literal one. Thus A covenanted
with B that his son should marry B's daughter before
he came to the age of consent. The year Est. Dig. 270
marriage did take place before that time and A son
at the age of consent married. This was held a
performance of the Covenant tho there now
was a legal marriage. The intention of the
parties was complied with.

Again a Deed covenanted to leave all the
timber trees on the land at the end of the term. The year 404
He cut them down and left them in this sort. The year 270
nation. This was held a breach of the Covenant
tho it was a literal performance.

A covenanted to deliver a piece of cloth to
B at a certain time. Before that time he injur-
ed the cloth and then delivered it. This was held
not to be a performance of the Covenant. The year 404
Shirred 390.

So when a Deed promised to deliver to A all the
the grains from his land and put as her in the D - 442
and then received them a delivery then was held Est. Dig. 271
no performance. The intention of the parties was
not fulfilled.

And upon a Covenant to pay
£ 50. it has been gravely determined, that this meant 100 s. 151.
£ 50 in money and not 50. weight of any thing.

When the words of a Covenant are un-
certain they must be taken most strongly. 151.
Giving 102.

2d of 271, 272 the Covenant and make advantageously for the
 1600 534, Covenant. Thus when a Covenant is to pay
 £20 per annum to his son in Law then it is held
 that the annuity must be paid during the life
 of the Covenanted.

And if one Covenant to convey Land to such
 a one on such a day and before that day con-
 vey it in fee simple to some one else, the Cov-
 enant is broken and an action will lie in re-
 medially. For it is said that as he has once
 2d of 271 15^o bound himself to perform the Covenant after it is
 1600 213^o made the Law considers it as the it was physi-
 2d of 271 323^o cally impossible that the Covenant should be
 2d of 271 276^o performed. This is not to me a very satisfactory
 rule but it seems to be settled Law. The Cov-
 enant is not by the terms of it to be performed till
 a certain day and at that time the Covenanted
 may have in his power to perform it.

In some Cases a Clause in the form of
 an exception on a Lease or Grant will amount
 2d of 271 657^o to a Covenant in other respects not. When a
 2d of 271 640^o Lease or Grant is for certain subject excepting a
 1600 431^o certain part of it, this exception is not a Cov-
 1600 231^o enant that the Lessee will not enter or occupy
 2d of 271 140^o that part or disturb the Lessee in the enjoyment
 1600 231^o of it, and if the Lessee does enter he is not liable
 1600 231^o in an action of Covenant broken. As if it be said
 1600 231^o I have granted a certain Close this is not a
 1600 231^o Covenant by the Lessee not to enter that Close, but

But when the exception is of a thing or profit to be removed out of that which is leased the exception is a Covenant of the Lessee not to disturb the Lessor in the enjoyment. As if A leases to B with an exception of a right of way this is a Covenant by B that it shall have this right of way.

Also the authorities are not agreed but the same is the prevailing opinion.

I am not aware that the exception was ever held a Covenant unless the Deed was by indenture. But I don't think that this ought to or would make any difference. For when the Deed is sold it may be the act of both parties as much as when it is by indenture. Hawes 2386.

There is an established difference in the Construction of express and implied Covenants. The former are more strictly construed than the latter. 3 B. & P. 1637.
Thus if one by express Covenant agrees to perform a certain Voyage within a given time the Covenant is broken unless he does perform the Contract the prevented by inevitable accident. 3 East 233
8 B. & P. 259
2 N. & P. 258
Vol 2. 494
Hawes 471

So also if one Covenants expressly to pay rent for a House for 20 years, he is bound to pay the rent tho' the house be burned. He takes that upon himself and if he meant that should excuse him he should have made it a part of the Contract. Shug. 703
1 H. & P. 405
D. - 316
2 B. & P. 1477
Hawes 300

It has been a question whether in such a case Equity would relieve the Lessee. There is very little

little authority on the subject. The question
167th of 83, was once raised in England and the Chancellor
Holt^o 371 thought he might decide. He seems however
yet undecided.

In case of implied Covenants the non-
3rd Jan 1639 performance when the result of inevitable accident
Holt^o 300 is excused. Thus every implied Covenants
Dough^o 254 not to commit waste. Yet if the House of
13th Feb 444 blown down by a tempest or destroyed by light-
ning, it is not a breach of the Covenant.

But it is a Gen^l rule that performance
Exp^o Dig^o 270 of an express Covenant can be discharged by any
collateral act.

Is this rule then an absolute exception?
Thus one Covenants to do what at the time is
Salk^o 198 lawful, and the act of the Legislature after-
wards makes it unlawful. Thus in Custom
1st of 25th of Law it is impossible that the Covenant
should be performed.

So if one Covenants not to do a thing law-
ful at the time and a Stat^o afterwards makes
it his duty to do it, he is discharged from his Cov-
enant. This is the rule as laid down but I
think it would make no difference were the thing
unlawful at the time.

There is another Gen^l rule that Covenants
1st Dec 58 are confined in their operation so far as it per-
Holt^o 223 tains the subject matter so that a thing is in
2nd Aug 1104 being at the time of making the Covenants. If

As if in a deed the Deftd. Covenants to pay all
taxes this Covenant does not extend to those taxes 354 377
which are afterwards laid by a new Law. This
was not the meaning of the Parties. But were
the Covenant to pay, all taxes of whatever name
or nature, that should at any time be laid, this
would extend to all taxes whatever. This is not
an arbitrary rule but one founded on the Suppo-
sed intention of the Parties.

Covenants contrary to Sound Policy like all
other Contracts are void. 48 Bar 2325
Covenants 341
Do 729
354 377

If one leases a person's Chattel for a year
limited time, and covenants that the Lessee shall
enjoy for that time it is a question whether if
it becomes useless for want of repair a refusal
and neglect to repair by the Covenantor is a
breach of the Covenant. I think the opinion
that it is no breach of Covenant, the most ra-
tional and correct. It is said that the Lessee
cannot enjoy the use of the thing. But the
intention of the Parties was only that the Coo-
venantor should give up his right.

An assignment of a Chord in action by Deed
amounts to a Covenant by the assignor that the
assignee shall have the interest and that the as-
signor will not disturb him in the Collection of
it. At C & S the assignee is not assignable 23 Ray 338
but then the Covenantor is bound on their in-
posed Covenants. Thus if a bond is assigned by
Deed. 1242
Vol. 1834
Salk. 125
Rae 317
23 Ray 338
Do 1242
354 377
Deed.

Did the assignor afterwards release the obligor this
 Ch. 11. is a breach of his implied Covenant and an action
 109 of Covenant broken will lie in favour of the assignee.
 184 This is the usual remedy in England.
 1842

If the assignor be not by Deed there
 can be no Covenant, for a Covenant is always
 by Deed. But the assignee may have a remedy
 when the assignment is by deed, if the assignor
 afterwards releases the Debtor.
 1842

In Court the usual practice where
 184 there is a discharge after an assignment is for the
 assignee to bring an action of fraud, tho' if the
 assignment is by Deed Covenant would run
 doubtfully too.

Covenants like all other contracts are
 1842 to be construed and carried into operation and
 341 done to their legal effect. Hence a Covenant
 10. not to sue within a certain time is no bar
 1842 to an action by the creditor. This is merely
 1842 a Covenant and an action will lie for the
 1842 breach of it - 1842

But if the Covenant is never to sue
 1842 this amounts to a release and may be pleaded
 1842 as such to an action bro't by the Covenantor.
 1842

The reason of this distinction is this. If
 the former be the Covenant word to the creditor
 a release "pro tempore" it would ever be a bar
 to a personal action or might be suspended in some cases
 1842

But in the latter case the Covenant is intended by the Parties to destroy the Covenantors right of action for ever and should therefore operate as a release. Were he permitted to move his Debt he would be immediately ^{obliged} on his Covenant to refund the whole amount. This Covenant is then construed as a release to prevent a multiplicity of Suits. And if the Covenant not to sue for a particular time, is part of the instrument on which the Covenantor claims to recover, this Covenant is a bar to the action till that time. The being part of the instrument it must be taken into consideration in the construction of the Contract to show what was the intention of the Parties.

8 J. Rep. 483
D. 737
2 Str. 690.
1 Lev. 152
1 Selw. 593
Hale, - 89

And the rule that a distinct Covenant operates upon the instrument not to sue in a particular time, applied only to personal actions. - For a temporary suspension of a real right does not destroy it. As to Real actions then such a Covenant is a bar "pro tempore".

2 H. Bl. 14

And a Covenant not to sue in a foreign Country is a bar to any action brought in a foreign Country tho it is not a total release. It operates as a local release, and as to the Places to which it extends, a total one. This has been very lately decided in Westminster Hall.

2 H. Bl. 603
D. - 171

A Covenant not to sue one of two joint
and

and several obligors is not an action ag^t the
 other. And I take it to be clear that it is not an action
 85 Rep. 108 action ag^t either. Covenants are sometimes con-
 sidered as releases, tho they are never actually so, tho
 22 Rep. 590. prevent a multiplicity of suits. But construe-
 11 Mod. 234. ing it a release would not here have that effect.
 12 W. 551. It is merely a promise that the Debt shall be collect-
 ed out of the other obligor. But if the obligation
 10 W. 593 was joint only, such a Covenant would be a bar
 8 W. 39 to an action on the bond for one cannot be sued
 without the other.

On the other hand a release to one of
 two joint and several Debtors is a release to both
 85 Rep. 108. The release releases & discharges the Debt for it dis-
 charges what the person taking the release owes,
 and he owes the whole.

But if a Creditor grant to a Debtor that he
 11 W. 939 shall not be sued before such a day, and that if
 he is he may plead this grant as a discharge, and
 22 Rep. 210 that the act of bringing a suit shall discharge
 6 W. 123 the debt, or that this act shall release the ob-
 11 Shaw. 40. ligation this is construed a release
 10 W. 330. 350
 22 Rep. 440.
 10 W. 594.

There are certain Covenants incidentally used
 in Conveyances which require a particular Consider-
 ation. In general all Conveyances except releases are
 a release call "Quit Claims" there are two Covenants
 either express or implied. 1st A Covenant of Seisin
 in a Conveyance of a Freehold or that the Grantor is
 will

well Seised and has good title in any Conveyance.

2^d A Covenant of Warranty, or that the Grantor 4 Coke 86,
 shall quietly enjoy. If these Covenants Rolle 510
 are not expressed they are implied by Law. These 2^d - 520
 Covenants then accompany every Conveyance unless
 there are some restraints. In Real Claims the
 Covenanted Covenants expressly that the Covenantee
 shall enjoy without let or hindrance from him or
 any one claiming under him. This restrains the
 implied Covenants which would otherwise arise.

On a Covenant of Seisin or that the Grantor 4 Coke 170
 has a good title, the Grantor may maintain 2^d - 359
 an action before he is evicted for the Covenant 9 Coke 80
 is broken as soon as made and an action will 3
 lie immediately. It is sufficient to show that
 the Grantor was not Seised, or had not a good title.

But on a Covenant of Warranty the Grantor 4 Coke 170
 cannot maintain an action till he is evicted. 2^d - 359
 The form of this Covenant is "I hereby Covenant 9 Coke 80
 for myself & my heirs I will warrant and defend 3
 the Grantee & my heirs & demands what
 soever. As long therefore as the Grantee quietly
 enjoys he cannot maintain the action for the
 Covenant is not broken.

In an action on a Covenant of Seisin it is
 a sufficient assignment of a breach to state that
 the Covenanted was not Seised. It is not necessary 4 Coke 170
 for the Plaintiff to state who ^{was} Seised. This is laying 9 Coke 80
 the breach in the terms of the Covenant which is 2^d - 359
 good.

generally the best way. The Deft must then show that he was seized. If he shows a "prima facie" title, the Plff must then show a higher title in another. But if the Deft shows no title he must fail.

And a Covenant of Seisin is broken by an existing incumbrance on land, unless the incumbrance is excepted in the Covenant. Thus where the mortgaged Covenantor that he is well seized the existing mortgage is a breach of the Covenant. I take this to be the rule as well in England as here as the Books are not clear. In this State there can I think be no doubt for the Covenant is that there is no incumbrance whatever. And I think the Covenant of Seisin in its usual form implies that the Covenantor has complete title in fee.

On a Covenant of Warranty I have observed that there can be no recovery until after eviction. And the Deft must state in his declaration that there was an eviction, that it was made under claim of title, and that under a good and older title than his own. If he merely states that he was evicted by such an one under lawful title it is not sufficient. For he may have been evicted by one claiming title from himself.

But if it appears from the declaration that the eviction was under older title it need not be stated "notidem tenetis". But its best effect is to state it expressly. It is

4 Broke 80
6 Co. fa. 313
1 H. Blk. 3. 8
1 Mod. 242
2 Wms. 177

2 Eving 37
15 Mod. 617
8 D. 278

It is not however necessary for the Plaintiff to state under what title the eviction was made. It is not necessary to state that the person evicted had a fee simple or a fee tail, or that he derived his title from such or such a person. These facts the Plaintiff may not know. It is sufficient to state that the eviction was under good and close title.

2 Green 37
25 Rep 847

In *Siderfin* and *Saunders* it is said that the declaration must show under what title the eviction was made. The meaning must be that it must show an close title. If they mean more it is not law. It has been overruled.

The reason why the eviction must be stated to have been under any title, is that the covenant was not meant to extend to tortious evictions, but merely to ensure the title to the grantee. It is therefore indispensable that it be stated the eviction was under title.

15 Edw 498-9

Alleging that the eviction was under a Sdg^y of Ch is not sufficient. For the Sdg^y is not conclusive and cannot be given in evidence, in a his action, the grantee not having been a party. And besides the Sdg^y upon which he is evicted, may have been obtained by virtue of a title from the grantee himself.

Sdg^y 400
Hobart 34
35 Rep 584
40 D. 616
60 Eliz 977
46 Geo 80

There must state only so the ordinary covenants in conveyances. For the grantee or any other person may covenant against tortious acts.

of all the world if they please. It is not neces-
 sary in such case to state that the eviction
 was under good and lawful title. It is not to be
 supposed that any man would be fool enough
 to make such Covenants but if he does he
 must abide by them.

Abstract of 9th And a Covenant of warranty ag^t evictions
 by any particular person or persons extends as well
 to tortious as to lawful evictions by them. This is suf-
 ficient to be the intent of the parties.

But if the Covenanted distincts even by a
 tortious act under claim of title he is liable on
 his Covenants; if not under claim of title only,
 as a trespasser. And in an action on the Cov-
 enant it is not necessary for the Plaintiff to allege
 that the Defendant had any title. The rule that
 the Plaintiff must state that he was evicted under
 title extends to lawful evictions. It is under-
 stood to relate to the Claim of title persons only,
 and the Covenanted cannot where he intended un-
 der claim of title say in his defence that he
 did enter such claim yet that he has no title.

I will here observe on account of its connec-
 tion with this subject, that an eviction by the Lessee
 suspends the rent, but one by a third person does not.
 After the Lessee has repaired the Lessee of what out of which
 the rent is to rise he ought not in justice to till the
 claim of the rent, and such is the Law that he cannot
 and

And the rule cast before this extends to all persons Dyer 257⁶
included in the Covenant by operation of Law as 26 Hen^d Dig 564
Hous^d Ex^{or} and Am^{or}. If they evict under Claim of Right Est. Dig 302²
they are liable on their Covenant.

A great Covenant of quiet enjoyment by an
Ex^{or} or Am^{or} as such is restrained to themselves and those
sons claiming under them i.e. the blood must hap
pen by them or some person claiming under them. 176 Bk^c 34

Suppose an Ex^{or} as such leases a Personal Chat-
tel and Covenants generally for quiet enjoyment
Then the rule applies. The reason of the rule is that
he covenants in his representative capacity, and
therefore he is liable only in that capacity.

In England when the Plaintiff recovers on a Cove-
nant of Seisin he recovers the Consideration money
and interest. When he recovers on a Covenant of
warranty he recovers the Consideration money and
rent and damages also the costs of defending his
title. In this law view I find no English decisions
I infer it because seems perfectly reasonable. 1 Selw^d 551

In Conn^t the recovery on a Covenant of Seisin
is the same as in England. If the recovery is on a
Covenant of warranty, the value of the Land at the
time of the eviction together with the costs of the
eviction are the rule of damages. 3. Wils^y

If I am right with respect to the English
rule you will perceive it is different from our own
And the reason of the distinction is I apprehend this
In

In England the value of Land has long been settled. So that the value at the time of the eviction was probably the same as at the time of the purchase. The consideration money then and the interest is the true measure of the damage which he has sustained by the eviction. But in Court and in all other new countries the value of Land is constantly increasing. The value at the time of the eviction then is the only correct measure of the damage sustained by it.

page 117-18
shown 500
vol. 4 -
p. 487-488

On a Covenant of Seisin I take the rule to be that the assignee of the Granted cannot on this maintain an action agt. the Grantor. This Covenant does not in legal language run with the Land. And the reason is that the Covenant is broken at the time it is made. It then becomes a mere chose in action in the Granted agt. the Grantor and as such it could not be transferred. At any rate this was the decision of our Sup^{re} Ct in 1804 in the case of Tyler agt. Gifford upon a solemn review of all the English authorities.

Vol. 4 p. 1589
Exp. Dig. 295
5 b. 10
D. 17

But the assignee may maintain an action on a Covenant of Warranty if the eviction happens during the granted time. You had you will observe the Covenant is not broken till the assignee has the title. The injury is directly to him. The assignee never had any right of Action. This rule is not clearly established by authority.

In any of these cases where an action is
Cro. -

but he with the grantor he ought for his own security
to notify the grantor that the deed is done, that he
may, if he please appear and defend his title. —
The grantor is not bound to appear and if he does,
not the grantor must defend as well as he can.

300
1300 532
101
305

This is a common practice in Conn. The Eng
land it is only done in actions that demand their
Ejectment. it only a fictitious action having fictitious
parties. This notice is here given by a writ of
Summons. Called after the English manner a writ of
Vouches. I observed that the covenant should
give notice for his own security. If the grantor is
not vouched he is not concluded by the Judge. But
if vouched and thus has an opportunity of becoming
a party he is concluded whether he appears or not.
If then the voucher brings his action the Judge is
concluded evidence that he was cited by good and
due title. This is the rule in Conn. I can find
no English rule on the subject.

But claims or more properly releases contained
in the covenants of such I have been meeting
But it was formerly supposed in Conn. that the
release was liable on an implied covenant if the
and any means of securing the release. But this
was never thus settled in England. And it has been
tately determined the other way by our Supreme
Court.

20 Day 1838
where all the
English authors
are the same

Distinctions

Distinctions relating to Covenants, and other
Contracts to pay money by Installments.

On a special bond conditioned for the payment of
\$1000 80 an aggregate sum by installments the action of
Assumpsit 515 Debt will lie at C & L for the nonpayment of the
1st 814 first installment when due. Thus if a special
bond be given conditioned on the nonpayment of \$200
233 AD 168, Debt ^{100 Dollars} at the end of six months, and 100 Dollars at the
1st of Decr 559 and of twelve Debt will immediately lie at C & L
if the first installment is not paid. * And the
* See page 219 whole penalty will be recovered for it is forfeited by
a breach of any one condition.

page 219

But if a single bill be given for the payment
of an aggregate sum, by installments no action
will lie till the last installment is due. You
here you will observe there is no penalty for breach
of the conditions. But it is in the form of a special
bond for the debt due. The only action which can
be had, and this bill is an action of Debt which
must always be on the entire contract. And as
* See page 210 there is no condition broken by the nonpayment of
the first installment the action will not lie till
all the installments are due. These rules are
in some of the Books very inaccurately expressed. —
"Coke" says some the rule that if a bond is given for
payment of an aggregate sum, by installments no
action lies till the last is due. But by "bond" here he
meant a single bill

But

But when rent is reserved by installments the
 Lessee may bring an action when the first instalment ³boke 22
 is due tho no bond be given This seems to 10 boke 128
 resemble the case of a single bill but the rule is
 the reverse. The reason of the difference is that in
 the case of a single bill there is one entire Debt -
 which cannot be apportioned But in the case of
 rent it is considered as a reservation of part of the prof-
 its of the Land of that part which shall have accrued
 on the day when the rent becomes due. These res-
 ervations are considered as distinct debts, not due
 as in the case of a single bill at the time the
 contract is made.

As to a Covenant or Note to pay an aggre- 1 Just² 29⁶
 gate sum by installments an action of Covenant ^{boke 173}
 broken on the Covenant or of assumpsit on the Note ^{24th} 3 boke 22
 will lie when the first installment is due and the 4 boke 94
 Plaintiff recovers what is due at the time. On the other 8 D^o 153
 hand an action of Debt will not lie on this Cove- ^{boke 105}
 nant or Note until all the installments are due ^{Salk^o 405}

If Debt is brought the rule is the same as in ^{11 D^o 578}
 case of a single bill for the same reason. The ac- ^{10 boke 457}
 tion must then be for the whole amount But ^{Contia}
 in the former case the action is only for the recov- ^{boke 118}
 ery of the damages sustained.

And if a Covenant is made for the
 payment of money at different times when there is
 no aggregate sum Covenant broken will lie when
 the first sum is due and I think Debt also will lie

Good.

Ed. Loughborough says in the case in "Henry
 Blackstone" that there has been always a difference
 1762 *W. 580* once in a covenant to pay 100 Dollars at four dif-
 ferent *600* *770* fixed installments, and a Covenant to pay 25 Dollars
 at the end of three months and so on for a year. —
 * *see page 217* In the former case Debt will not certainly lie
 for the whole in one. But in the latter case
600 *800* Debt will lie for any reason why it will not. In this
300 *168* case there is certainly no aggregate sum. Sup-
 pose the Covenants were in different papers to pay
 25 Dollars at the end of each quarter Debt would
 undoubtedly then lie on each of those Covenants
 and I see no reason for a difference where the
 Covenants are all on one paper. I know of no
 opinions directly to this point. But I think it is not
 the distinction referred to in *W. Bk.* I don't know
 what it is.

If a person a covenant for the payment
 of an aggregate sum by installments there is a
 clause that upon the nonpayment of any one of
Chilgob, 212 them the whole shall immediately be due. Such
213 clause is binding. Then then Debt will imme-
page 219 diately lie for the whole sum if any one remains
 unpaid at the time when due. But if there is
 no such clause the only action is that of Covenant
 broken. And I would here observe that in an ac-
 tion of Covenant broken the Plff. may assign any
 number of breaches. For there may be many
 breaches and the Plff. in this action can recover
 only

for what he says in his declaration. As if when
 the covenant is to pay an aggregate sum by in-
 stallments he says a failure to pay only, as res. 4 Dec 134
 puts the last he can move only for that. tho. D. 135,
 none of the installments have been paid. But about 498
 on a penal bond at C. & the Plff. can assign only 12
 one breach tho there has been any number Comb. 297.
 And the reason is that at C. & one breach suffices 2 Willm 203
 the whole penalty. Alleging more would therefore 3 Salk. 108
 be superfluous in pleading. The action being Debt
 the whole must be moved if a breach is proved page 322

The Court when a penal bond is given con-
 ditioned to pay an aggregate sum by installments
 or to do any number of acts the Plff. must for
 his own security allege as many breaches as there
 are. For by our Stat the obligor never moves Stat. 35.36
 for the whole amount of the bond unless that is
 the amount of the damage he has suffered

The Stat gives the Ct power to charge upon the
 bond as they enquire into the amount of the
 damage sustained, and give judgment accordingly.

And now in England by the Stat. 8 and 9 of 2 Willm 377.
 upon 3rd the Plff. may assign as many breaches as 8 Salk 120
 he pleases and will move only to that amount 2 Salk 1111.
 And so he must for his own security assign all the D. 1016
 breaches of the bond. 2 Burr 820.

I would here however observe that at C. &
 where several breaches are assigned in an action Comb. 297
 on

on a bond advantage can be taken only by the
 12 Bacon 135 and secured. The fault is only in form.

Who are bound by Covenants

1st As a general rule the B^d and A^m are bound
 2 P. Wms 107 of covenants without naming. They are in the
 2 Rolle 519 language of the law implied in himself. Thus
 12 Bacon 138 if I covenant to pay a sum of money at a certain
 time and die before that time my B^d or A^m
 is bound by that Covenant. The usual method
 however is to name them.

2nd As to these are some exceptions.
 12 Eloy 553 When the act is to be performed by the Testator
 12 Rolle 533 personally the Covenant is then fiduciary and
 2 M^o 207 not transferable. As if I agree to labour for
 Com Digest another a year and die before the expiration of
 Covenant C^t that time my B^d or A^m need not perform the labour
 nor procure another to do it. If the Covenant
 be to pay a sum of money, it makes no differ-
 ence who pays it.

3rd As even in this case the Representative
 Com Digest is bound if the Covenant is broken during the
 Covenant C^t Testator's lifetime. For at his death he was then
 12 Eloy 553 in damages. And then become a chose in
 12 Rolle 533 action and for this the B^d is liable.

4th As a general rule in fee may bind.
 12 M^o 213 As if I covenant. Thus if A covenant in
 12 Eloy 553 fee simple Covenants to convey to B and die his
 12 Rolle 533 heirs must convey in pursuance of the Covenant.
 So.

So if A had been tenant of a term for years his
Ex^r or Ad^r would have been bound to convey. Super-

There are Covenants real or Covenants to convey Gibbs B343
on a free real property. And it is a general rule that Holle 530
they bind the Heir of the Covenanter, and descend Holle 1587
to the Heir of the Covenanter who is named.

And the Heir of the Covenanter may sue on
the Covenant who is named if the Covenant runs 2d Rev 92
with the Land, and it appears that it was design Skinner 305
ed to continue after the ancestor's death. Thus, Exp Dig 2945
if the Repeal Covenant to leave the fence in repair
and the Repeal dies his Heir may sue for a breach
of the Covenant

And at Q. And the Heir having affected by
descent is bound by his ancestor's Covenant if named
or warranty. But he is not liable unless he has West 170
affected and only to the extent of affect. E.g. A. D. -- 347,
makes a Covenant of warranty to B. and dies -
leaving to his Son C certain real Estate H. B.
if created C is liable in damages to the amount
of the estate left by A if the damages are so much

I have been informed by our Judges that it
was formerly held in this State that the Heir was
liable on the ancestor's Covenant of descent. But
I doubt whether when purchased the Heir was ever page 110
be liable in this State. If the ancestor were
not seized the Covenant was broken "so instantly" in H. Conn 209
which it is made and the ancestor was immediately
liable

liable to an action. This was then a Debt or chose
 in action. agt. the ancestor. And our Stat. 7 Geo.
 2 c. 270. vides that the Ex^{or} or Adm^r, shall pay all outstand-
 ing Debts. Upon a Covenant of warranty
 where the breach happens during the life time
 as it is expressed he is undubitably liable as at L
 But not I apprehend where the breach was before
 his time for there again there was a right of ac-
 tion agt. the ancestor.

All covenants respecting Estates may be divid-
 ed into two kinds - such as run with the Land
 and collateral ones or such as do not. There
 are certain very material distinctions as to the
 liability of the assignee granted and depending there-
 upon different Covenants.

As to Leases it is a gen^l rule that the assignee
 is liable for all breaches of Covenants run-
 ning with the Land. But if the Covenant be collateral then
 the assignee is not liable.

As to what Covenants run with the Land
 this I take to be the gen^l rule. If the thing
 covenanted to be done or concerning which some
 thing is to be done, was "in esse" at the time of
 the Lease and part or parcel of the thing leased
 the Covenant runs with the Land. This may be
 best explained by examples. A lease to B Land
 and buildings and the Lessee covenants to keep the
 buildings in repair. Then the Covenant runs

according to the definition must with the Land the
 assigned would therefore be bound to repair. The *Moor* 357.
 And though in the Subject seems to be that *28. 1159*
 when the Covenant runs with the Land, nothing
 to be done is annexed to the thing leased. Again
 the Lessee covenants to pay rent and a 11 Gnt. Does
 the Covenant here run with the Land? Why yes
 for the rent is "potentially" in eff^d the nat^l Sub-
 stantially so is the thing which produces the
 rent is "actually" in eff^d. For the rent is paid
 out of the Land leased

1 Selwien 507

But on the other hand if the thing to be
 done or concerning which something was to be
 done, was not in Eff^d and was not part and par^t
 of the thing leased the Covenant is collateral
 or does not run with the Land. If then the
 Lessee covenants to build a wall on the Land
 "de novo" - the assignee is not bound unless named
 in the Covenant. Hence the Covenant is collateral.

Stoke 46
3 Burr 1241
Co. Lit. 552
13 Bar 534

So a Covenant is said to run with the
 Land if it goes to the support of the thing so
 leased. In such case then the assignee tho'
 not named is bound by the Covenant. As
 when the Lessee covenants to make all necessary
 repairs, or to leave so many acres of the Land
 unplowed. In these cases the Covenant goes to the
 support of the thing leased and so the assignee is
 bound without naming.

Stoke 17
16
24
Co. Lit. 125
3 Levins 233
11 Mod 303

And.

And upon a covenant that runs with the Land the assignee is bound whether the assignment is of the whole or part of the premises only. This rule cannot however I conceive be universal. When the covenant goes to the support of the thing, denied the rule I think is applicable; otherwise not. Thus where B the Lessee of 10 acres assigns 5 to C. C is bound by B's Covenant to support his part of the demise.

2 East 580
Cocke 222
1 Selw 510.

When the assignee is named he must perform all the covenants of which I have been treating whether they run with the Land or not. The difference then appears to be this. If the assignee be not named in the Covenant he is bound only when the Covenant runs with the Land. But if named he is bound whether the Covenant runs with the Land or is only collateral. As when the Lessee covenants for himself and his assigns to build a wall &c. on the premises the assignee is bound by this Covenant tho' it does not run with the Land. The assignee by accepting the assignment ratifies the Covenant as it respects himself. Between the assignor & the Lessee.

5 Co 10
1 Bac 534
1 Selw 507

This rule however is confined to cases when the Covenant is to perform something which concerns the thing denied. If the Covenant be to do something entirely foreign to the thing denied the assignee is not bound even tho' named. Thus

5 Co 10
Cocke 438
1 Inst 352

Thus if the Deftor covenant for himself and his assigns to build a House on a different piece of Land than that leased, the assignee is not his bound 15 Mod 507
He is a stranger to the covenant for merely naming him does not make him a party unless he afterwards ratifies the contract

But when according to the rule already given the assignee is bound by the covenant he is only so far bound as to be liable for breach which he does or covenants broken after the assignment

If the breach or rent due is before the assignment the Deftor and not the assignee must be answerable. And as to this and many other points on this subject the assignee is bound up 15 Mod 350
and the covenant is bound or bound only in case of possession of his own possession or the privity of estate between himself and the Deftor. This 30 Bar 1271
principles gives occasion to many diversities. — Doug 443

Suppose the Deftor break his covenant and then assign. How upon the principles just stated is the assignee liable in respect of ^{estate} contract between the assignee and Deftor while the assignment? the assignee is not bound nor liable for the breach. But the Deftor is bound by all his covenants on the ground of privity of contract

Upon the same principle the assignee is not bound by the covenants after he has assigned if he is not liable for breaches which happen after his time. As when rent becomes due after the assignment 15 Mod 350
assignee

assignment he is not bound to pay it. For his liability depending on the purity of estate and the purity ceasing with the possession is gone by the assignment.

And that rule is so strict that if the assignee assigns even the day before the rent is payable he is not liable for any part of it. In such case the land assigned must pay the whole rent. For rent is in the nature of an entire debt becoming due on the day of payment and cannot be apportioned. At the time of the assignment then in the case supposed there is not a farthing due.

And still farther if the assignee the day before rent becomes due assigns his interest to a tenant with an intent to defraud the lessor of his rent he cannot at Law be subjected -

The reason of this rule is that the assignee is liable by virtue of the purity of his estate which ceases with the assignment. If however in such case it be made to appear that the assignment was a mere sham and not intended to pass the beneficial interest the assignee would still be liable. The purity of estate still continues.

But when the assignment is to a tenant it is "bona fide". Otherwise compel the assignee to pay rent for the time he enjoyed the estate.

They can assign the rent and will compound 1 Hen 4th 353.
 payment "pro rata"

If the assignee be created of part of the
 premises only the rent may be apportioned 2 East 573
 this principle of estate as to that part which remains 3 Coke 22nd
 continued. And if he possess until the term 10 Jac 1 510,
 when the rent is due the rent as to that part 10 Jac 1 510
 becomes due and has accrued the rule is the
 same as to the Lessee.

I say the rule is the same as to the Lessee
 this is true where the action be ^{to} agt^d him in Debt.
 For this action is founded on the privity of Estate
 between the Lessor and Lessee. But if the action
 is Covenant-broken the rule is different. For this
 action is founded on the "privity of Contract."

There has been a question raised in England
 whether a Ct of Ch^{cy} can grant an injunction
 to restrain the assignee from assigning to a
 Bankrupt. There has been no decision. I
 don't see how an injunction can be granted, 1 Hen 4th 351
 They may give a remedy, if he does thus assign 20 All 216
 but the Estate itself being in its nature assign-
 able I don't see how Ch^{cy} can compound wth pro.
 how to restrain it 20 All 548

It was formerly doubted whether a Cove-
 nant not to assign by the Lessee would bind
 him. But it is now settled that it will. - 8 Mod 803
 8 Mod 800
 10 Mod 276

But such a Covenant is not broken by the
 Estates being taken by the Lessee's Creditors. This
 8 Mod 54
 2 Eq Off 100
 10.

is not his act. The Estate is transferred by the operation
 Dyer. 6 of Law and supposed to be so without the Deft's assent.

85 Rep's 59 Nor is such a Covenant broken by an under
 230. Rep 700 lease of part of the term. Thus if it is a Deft's
 3 Willm 234 for 20 years under lease to B for 10 years this is
 no breach of a Covenant not to assign. This is
 not an assignment transfers the whole interest

Nor is such a Covenant broken by the Deft's
 covering the term. For it must go into other
 hands at his death. As if it is a Deft's for 20 yrs
 dies at the end of 10. it is no breach of his Covenant
 to cover the Estate for the remaining 10 years. It
 is the intention of the parties that the Deft and
 his representatives shall enjoy the Estate for the
 whole 20 yrs.

3 Coke 22 The Deft's liability. It is
 23 a good rule that he is always liable for his ex-
 44 Rep's 98 press covenants as well for breaches after as before
 100 assignment. He is a party to the Covenant and
 443 liable on the ground of the privity of contract.
 199 A Deft for 20 yrs having covenanted to pay rent
 186 334 439 for that term must be answerable even after
 assignment.

As the Deft dies and the assignee for
 his term, by assenting thereto, is bound by
 60 La 334 towards maintain Debt and the Deft's interest
 186 444 and the reason is that the action of Debt
 140 334 runs in the privity of Estate whereas Covenant
 broken.

broken & ends on the Privilege of Contract e.g. A
 leases to B for 20 yrs. B at the end of 10 yrs assigns 36 Geo 33
 to C and A accepts rent of C. Here the priv- 186 Geo 439.
 ity of Estate between A and B is gone by mutual
 assent of the parties and Debt will not lie
 for rent. But even so that C and the Lessor may

maintain an action on the express Covenant
 for rent if there are any. For the Privilege of Con-
 tract still remains.

But if in such case the Covenant is
 only implied by Law the Lessor can maintain
 no action agt the Lessee. The reason is that the
 Privilege of Estate is gone. The Lessee has parted
 with his interest with the Consent of the Lessor.
 While then the Privilege of Estate being gone and
 there being no express Covenant there can be no
 action. But implied Covenants always arise from
 and depend upon the Privilege of Estate.

When the Covenant is express the Lessee is
 not discharged after he has assigned and the Les-
 sor has accepted rent from the assignee. And
 when the Covenant is express and likewise bind-
 ing on the assignee the Lessor may maintain
 an action agt them both at the same time on
 the same Covenant. As if the Lessee for 20, 30
 yrs Covenants for himself and for his assigns to pay
 rent for that time an action lies at the same
 time agt both. But the Lessor can obtain but
 one

Geo 33
 322
 1 Sanders 237
 186 Geo 439
 186 Geo 439
 186 Geo 439

Geo 33
 532
 186 Geo 439
 186 Geo 439
 1 Sanders 241

Geo 33
 233

one Satisfaction, unless the Lessor Costs. is if he has an over of the Lessee or assigns he cannot cover nothing but Costs. of the other. And in such case if the one of whom he has not paid and tends to him the Costs. and the Lessee still pursues the action the Dist. may be relieved by an *Credito Quercula*. -

By the 3rd of Henry 8th who granted of the Lessee has the same remedy on the Covenants
 1st 31st running with the Land as the Lessee himself has
 6th 32nd at C. Law. When the Lessee assigns to S. S. A. stands in his place as to recovery on the Covenants. And by the same Stat^{ute} the Lessee has the same remedy, agtst the Lessee, granted as he before had agtst the Lessee.

There is a marked distinction in Law between the assignee and the derivative Lessee, or under Tenant. A derivative Lessee or under Tenant is one who takes from the Lessee a Conveyance of part of the term or who takes the whole residue of the term as Tenant to the Lessee. An assignee is one who takes the whole residue of the term as Tenant to the Lessee. Thus where A is Tenant for 20. yrs and at the end of 10 yrs assigns to B in the common form so that B is Tenant of the Lessee B is in such case an assignee. But if in such

Such Case A leases to B for 9 years - or transfers the whole term expressly reserving rent to himself. B is in such Case. derivation Lessee or under Tenant. His landlord is the Lessor.

This distinction is very important. For the 1st title 347 under Tenant is never liable for the Covenants 8th Doug. 174 in the Lease. He is a Stranger to the Contract. D⁴ 438,

So if the Lessee mortgages the whole term, the Mortgagee is not liable to the Lessor unless he takes possession. There is no privity between Lessor and the Lessee. For if he takes the Mortgage merely as a security, he is regarded merely as an incumbrancer, and not a purchaser D⁴ 438.

This then is the specific difference, that an assignment is a Sale of all the Lessee in Trust and under Lease is the creation of a Tenant under him. The assignee is Tenant to the Lessor. The under Tenant to the Lessee.

Further Assignees are liable to the Covenants according to the distinctions already made, whether the assignment be an actual one or by Deviser, or by Sale under Execution. It makes no difference how the assignee is a Purchaser whether by assignment or not. As if A Lessee for 20 yrs at the end of 10 yrs dies devising the remainder of the term to B B is bound by the Covenants.

Covenants, as assigned as much as if the assign-
ment were by Deed. And the rule is the same
when the remainder of A's term is taken over
E's and sold to B.

It is a point not settled in the Books
whether a signed copy of part of the promised
lawyer's fee only is liable for any part of the rent? ...

The question arose in 2d Mansfield's time.
But there was no decision. It seems to me

that there would be a difficulty in apporportion-
ing the rent, tho' there is one case before men-
tioned, in which the rent is apportioned (i.e.) in
case of eviction from part of the premises.

Co. Ely, 33 The meaning of my opinion is that the assignee
is liable for no part of the rent. The lessor
is already liable for the whole.

Co. Ely, 33 The lessor covenants for himself and his
assigns as long as they continue in possession
and the assignee takes over after the expiration
of the term he is liable for breaches of the cove-
nants which he does during his possession as
well as before the expiration of the
expiration of the term. The covenants ex-
tend beyond the term and as he is express
he is bound by them.

There are certain further dis-
tinctions between the rights and duties of the prop-
rietor of Covenants and Covenanted.

J.

I have already observed that the Heir is bound in Covenant if he has assets by descent. And further, in and with the Land action by the Covenantor agt the Covenantor's heir, an infant is not as to the action. The parole may demand as it is called in Law is final judgment will be stand till the infant arrives at full age. But his infancy is not pleadable in 45 Rep. 177. An infant is a bar to actions but no contracts made by him except for necessaries. But here the Contract is made by his agent, who is capable of making the Contract and devolves upon him by operation of Law.

If A for himself his Heir and assigns covenants with B for quick enjoyment and the Covenant is broken during B's life his Ex. who 1 Vent 170 not married shall have the action and not his D^r in 347. Heir. Damages are to be recovered on a right 2 Levins 26 of action which accrued before the Testator's death 1 Rep. 80 158. These damages if recovered by the Testator - Est. Dig. 295 would have gone to increase his personal fund and of course the right of action goes to his Ex.

But if the Covenant is broken after the Covenantor's death his Heir and not his Ex. shall 1 Rep. 80 158 have the action. As if A covenants in Fee to B D^r - 159 and covenants for quick enjoyment and after B's death the Covenant is broken B's Heir has 2 Levins 92 the right of action. Here the injury is direct by to him & right of action over vests in the ancestor.

Or

1740 54
 240 14
 60 533
 24 11
 128

On the other hand the rule is that the Cov-
 enantor Ex^a tho' not named is always liable
 for breaches in the Covenants c^os, and this both
 in Covenants Real and Personal. The right
 of action was ag^t the Covenantor and the
 action if broⁿ before his death would have de-
 ministered his Personal Fund. Tho' Ex^a is there-
 fore liable after his death. And the action
 will lie ag^t the Covenantor Ex^a, even when
 broken after the Testator's death, if the Cov-
 enant was express. And the reason is that when
 the Covenant is express the action is grounded
 on the Privilege of Contract. And the Ex^a is
 always privy to the Testator's Contracts, &c.
 I think an express Covenant of warranty, &c.
 And there is a breach after A's death, after
 his land Ex^a may be sued.

60 533 There is an exception to these rules, when
 the Covenant is to be performed by the Cov-
 enantee himself in where it is fiduciary.

257 But if the Covenant is not express but
 merely implied in Law the Ex^a is not liable
 for a breach, ^{but} after the Covenantor's death
 157 e.g. I conveyed to B by the words 'and it con-
 533 ceived' he had a breach of the Covenant implied by these
 533 words, happened after the Covenantor's death, his
 Ex^a is not liable. For the Covenant is, real
 and implied. And upon an implied Covenant

the action is founded on the privity of Estate. —
 As there is no privity of Estate between the Ex^r and the Covenanted, the Ex^r cannot be liable. The
 Heir only, in such case can be sued

When the Ex^r or Adm^r comes into possession
 of an Estate leased, in his representative capacity he ^{will} be
 may be sued as a assignee for breaches during his Salt^o 309
 own time. For in contemplation of Law he is Exp^r 219 390
 assigned. This is merely a rule of pleading.

The Heir is liable for breaches of Cove-
 nant both before and after the Covenanted's death. 11 Gouth 357.
 if he is married and has real assets by descent 1 Inst^o 363
 otherwise he is not. Ex^r A enters into a Covenant D^o 370, 373
 with B for "himself and his heirs" and dies leav- D^o 384
 ing an Estate to his Heir. His Heir is liable for 2 Inst^o 378
 breaches of the Covenant to the amount of assets. 3 Inst^o 27.
 But if he has no assets or is not married he
 is not liable.

The Court however the action must in gen^l
 be agt^d the Ex^r whether the breach be before or
 after the Covenanted's death. The gen^l the Heir is not
 liable at all. But if he is married and has assets
 he is sufficiently liable for breaches in his own time.

But not as to those which happen before even on
 Covenants of Seisin and Warranty. The reasons
 of this rule I have given in a former part of
 this Title.

Covenants &c

Covenants and Bonds to save harmless.

A Covenant or bond to save harmless is merely to save the Covenantor or obligor ag^t some p^{er}sonal liability or loss. These are given in many cases. When any one becomes surety with the Debtor it is usual for the Debtor to give a bond to save the surety harmless. This is one of many examples. And it is a gen^l rule that a contract of this nature is not broken by the tortious act of a third person. A covenant of quiet enjoyment may be a covenant to save harmless, as when the words are "to save harmless of any eviction". Suppose then the assigned Covenantor to save the Lessee harmless of paying any future rent. Then if the Landlord legally distrains, or rent the assigned is liable on his own Covenant. But he is not if the goods of the Lessee are unlawfully distrained.

When a Sheriff admits a prisoner to the liberty of the yard it is usual practice for him to take a bond to save him harmless of any escape. Then if the prisoner escape the Sheriff may maintain an action immediately and it is no defence for the surety to say that the prisoner has not sued the Sheriff and so he has not been damaged. The construction of the bond is in Law to save the Sheriff harmless of such liability. The prisoner's escape and the Sheriff's consequent liability, are sufficient ground of recovery. Again.

Co. Cl. 53

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3739

Again if a Surety take a bond of the Debtor to
 save him harmless, and the Debt is not paid 2 Bull 234
 on the day appointed for payment he may in Salk 190
 immediately sue the original Debtor on the ground 5 Coke 214
 of his liability and he is not obliged to wait till 2 Rep 100
 he has himself been subjected by the creditor. 2 D° 640
 3 D° 377

As when B a Surety with A the Debtor gives 4 D° 714
 a Note payable at the end of 12 Months if the Debt 5 D° 307
 is not paid, and then pay the Note, an action may 7 D° 97
 immediately be laid by B in his own name of his own right.

This question has been decided both ways 10 Rep 507
 by Lord Supt Ch. The last case was decided in 2 Selw 150
 the Ch of Errors, agreeable to the rule I have given 314

But suppose the original creditor bring
 an action agt the original Debtor after the Surety
 has recovered Supt Ch. then on the Covenant to save
 harmless. The creditor will recover. But the Surety
 by having recovered without sustaining any in
 jury will be compelled to restore the money in a 25 Rep 104
 Ch of Ch. And tho he has a right at Law to re- D° 105
 cover it was to answer damages which he might
 sustain in future. A Ch of Ch may compel page 220
 a restoration of Money recovered at Law where sub
 sequent events render it unconscientious to re-
 tain it.

It might have been a question some
 time since whether an action of Indictment af
 sumptit would not lie upon the principles of
 the.

2 Bann, 1005 the case in "Burrow". But that principle has
 78 W. 207 since been shaken by the case in "Tenn. Reports"

But if the bond to save himself be given
 after his liability has accrued the obligee cannot
 maintain an action on it till he has actually
 suffered. B as surety gives a Note with A's
 Debt. Payable one year after date. After the ex-
 piration of the year A gives B a bond to save him
 harmless the Note remaining still unpaid. B can't

Salk, 190 sue on this bond until he has actually suffered
 2 Bann 234 the damnification of his liability ^{anyway} ~~still~~ exists.
 180 507 And the bond is given to save him from some fu-
 ture injury. So if the Note given by A and B
 were on demand and A should at the time give
 B a bond to save him harmless B could not
 bring an action ag^t A until he had been sub-
 jected on the Note. Now were the surety's liability
 to support an action in this case, he might
 immediately maintain it, for he is already liable.
 It would be absurd to suppose that this was the
 intention of the parties.

If the surety take no bond of indemnity and
 Croker 525 is compelled to pay the debt he may maintain
 25 W. 1048 an action of debt ^{status} ~~status~~ ^{against} ~~against~~ the
 120 569 original Debtor for money laid out and expensed
 3 W. 14. Formerly he could not move at all. And now
 2 N. 180 he cannot maintain the action until he has
 been

been compelled to pay, and he will recover what he has paid. His mere liability will not ^{28 Nov 181} stop this action, for the payment of the money in the ¹³⁹ "res gesta" found which the Law implies the promise.

And if the Surety has taken a bond to save himself and is then compelled to pay the Debt he cannot then maintain an action of ^{25 Feb 100} ~~contract~~ ^{assumpsit}. For where there is an ^{ex} ~~express~~ ^{implied} Contract to remunerate the Law will not ⁱⁿ ~~in~~ ^{the} ~~one~~ ^{one}. And even if it would the action on the bond is a higher and of course a better and the only remedy.

In some cases the Covenanted after assignment may release the Covenants. In others he cannot. It is a gen. rule of C & D that after assignment generally the Obligor or Person who was to derive the Benefit may release if the obligation was not negotiable. But if it was ^{2 Levins 200} ~~he cannot~~ ^{brooke 503}. In analogy then to this rule ^{14 All 345} if the Debtor after he has assigned his interest releases the Debted Covenants, the assignee may still maintain an action for breaches after the assignment; because the Covenant is made assignable by the 32^d of Henry 8th. As if the Debtor assigns his interest and rent becomes due he having after the assignment released the Debtor from his Covenant to pay rent. In this case the assignee may recover the rent notwithstanding the release.

But on the other hand if the Deed has been assigned by the Deftor, he may releasing the Covenants of the Deftor and the assignee of his pen-
 cy, for breach of them if the release is given be-
 fore the action is commenced. As if the Deftor
 bro. Eliz 361 Covenants to make repairs to the amount of
 D. 503 50 Dolls per annum. The Deftor assigns his
 2 Rolle 411 interest and before an action commenced he
 Exp Dig 308, releases the Deftor from his Covenants. The
 assignee cannot maintain an action ag^t the
 Deftor for not repairing. But after the action
 is commenced it is said that a right of re-
 covery attached in the Assignee so that the Deftor
 can't release.

I suppose the reason of the dis-
 tinction between the effects of assignment by
 the Deftor and those by the Deftor is that the
 former are within the Stat. 32^d of Henry 8th
 and the latter are not. Covenants are not
 then in the latter case assignable, at least
 this must be the ground of the rule. But the
 Covenants of the Deftor to repair run with the
 Land and is on that ground I take it negotiable
 by the Gen^l rule of C. L. At any rate such
 a covenant is negotiable "Sub modo". For
 the rule itself I suppose that an action may
 be bro^d and maintained by the assignee before
 a release by the Deftor. I don't therefore see any
 satisfactory reason for the distinction so far as repairs are
 concerned.

It is a general rule that a release by the Cov-
enantor to the Covenantee before the Covenant is
broken of all demands is not a release of the Cov-
enant. Thus if A leases to B the Epsie Covenant
any day, with a proviso if in this case before B.D.D. 160
the end of the year A releases all demands against B, this is no release of the rent. The rent is not paid. 171.
one at the time the release is given it becomes 1st 29th
due at the end of the year and is not a "debitum" Mlyn 38
in presentia solventium in futuro. So a release before 99
of all actions and rights of actions is no release of
a Covenant not then broken. But a release of
all Covenants, before the breach of them will
discharge the Covenantor.

The Pleadings There are so great
many rules that apply to the pleadings in all
actions, and a great many which apply to the
whole class of actions on Contracts. These I am
not now about to notice.

1st The Declaration - must always state Myn 814
that the Covenant was by Deed. This is in in Co. Dig 517.
deffensible against. For a Covenant must be Co. Dig 108
in writing and sealed or in other words a Deed Co. Dig 209.

But if an agreement in form of a Cove-
nant be in writing and not sealed an action
will lie but it must be affirmation the case
and not Covenant broken.

The

The principal rules relating to the declaration respect the mode of laying or alleging the breach. And as to this one rule is that where the covenant is gen^d a gen^d assignment of a breach is sufficient, i. e. the breach may be generally assigned.

Salk^r 139 As where the grantor covenants that he is well seized
 2d Bar^r 478 It is sufficient to state in the declaration that
 Hob^t 170 he was not well seized. And on the other hand
 Esp^r Dig^p 298 the covenant be particular or special the
 breach assigned must be so likewise. As if a
 covenant that he was seized of all the estate
 which A. B. had in certain lands and that this
 was and state in fact the declaration must
 follow the Covenant in assigning the breach.

The most gen^d assignment is in the words
 Hob^t 80 of the Covenant with a negative. As where the
 Cow^r 369 Grantor covenants that he is well seized and the
 Grantor declares that he was not well seized.

And the breach must be always so assigned
 as to appear upon the face of the declaration
 to be within the Covenant. It is not suff^t
 Salk^r 8. I think that it may be proved to be within it.
 Cow^r Dig^p 348 That if the Lessee covenants not to cut down
 Doug^r 203 timber more than sufficient for necessary re-
 Esp^r Dig^p 298 pairs and the breach assigned be that he cut down
 to the amount of 1000 Trees this is not a suf-
 ficient assignment for the Court know that this was
 more than was necessary or sufficient for necessary
 use.

repairs unless it is so stated in the declaration.

And if the D^{ft} by subsequent words in the declaration narrows the breach first assigned he must confine his proof to the breach charged in the subsequent allegation. As if the Def^{or} c^{ov} 3^d Rep. 307. covenanted to use the Land in a husbandlike manner and the Def^{or} in his declaration states that he had not cut on the other hand that he has committed waste, he must confine his proof to the waste alleged.

When the D^{ced} contains a proviso to defeat the Covenant upon the happening of a certain event the D^{ft} need not notice the proviso. The proviso is in the nature of a defeasance. It is like the condition in a General Bond. Then and matters of defence for the D^{ft}. But if there is an exception in the body of the Covenant the D^{ft} must set it out and negat^{ve} it in the - Exp^d Dig^o 300. must show that the breach does come within it. 1 Selw^{en} 519.

The reason is that this is not a defeasance but part of the Covenant itself and if it is not set out there is a variance between the real Covenant and that declared on. Suppose the D^{ft} covenanted to repair all fences but one and the Declaration states that the D^{ft} covenanted to repair all fences, and says nothing as to the exception the variance is fatal. If the breach assigned is the not repairing 100 rods of fence, the

D^{ft}

It must further state that this is no part of the same excepted. But if the covenant were to expire all the times provided that if such an event should happen then this covenant to be void here the P. H. need not state the proviso. This proviso is no part of the Covenant.

It is a P. H. C. a general assignment of a signed and incumbrance book under a "Seal" this will after reading be rejected as a nullity. As if the Covenant were made on the 1st of October 1812 and the P. H. in relating should state that afterwards "Seal" on the 1st of Sep. 1812 there was a breach of the Covenant the assignment under the Seal will be set aside.

When the Covenant is in the alternative the breach must be assigned as to both. For otherwise there does not appear to have been any breach. As if a Covenant to convey to A. 100 acres of Land within one year or to pay him 100 Dollars. It is not sufficient for A. in this case to say that he has not conveyed the Land or that he has not paid the money. He must deny the performance of both. As if the same covenanted not to cut wood unless the Q. had assented or unless he assented. The Q. cut wood and the Q. said him taking notice that he had not assented. This was held sufficient. But he might have assented.

But it is necessary to distinguish between covenants substantially in the affirmation and those which the deceptor is not so in legal effect. In these last cases it is not necessary to assign the breach of both. Thus if one Covenantor to pay a sum of money or cause it to be paid it is sufficient to declare that he has not paid it. And if he has caused it to be paid he has paid it. *qui facit pro alio facit pro se.* 1000 339

When the Covenant is to perform one or two contingencies, whichever may first happen it is sufficient to declare that one of them has happened without stating it to be the first. 1000 133 And if one has happened the first must have happened of course. Thus if A covenants to pay a sum of money at his marriage or death which ever first happens it is sufficient to state that either event happened.

If the Covenant is for an act to be done by the Covenantor or his assignee, if the action is brought against the assignee the breach must be laid in the declaration as the declaration must state that the act has not been done by the Covenantor or his assignee. As when the lessor covenants to assign the himself and his assignee and takes an action for breach of Covenant brought against the assignee must state that neither of them has performed. But if the action is brought against the Covenantor.

Covenantor, it is sufficient to state that he has not repaid. Here it does not appear and it will not be presumed that there has been any assignment.

1 Salk' 137
3 Feble 440
S. Mod. 133

That in a Covenant to do an act as to convey land to a man and his assigns an averment that it has not been done to the Covenantor is sufficient. If there has been an assignment and conveyance to the assignee the Defendant may show it. But if the action is brought by the assignee he must sufficiently state that the act has been done neither to the Covenantor nor himself. There is the same reason for this distinction here as in the former rule. So Holt lays down this rule very obscurely.

When the Covenant is for a sum certain there can be no apportionment of the unpaid demand. The assignment of the breach must follow the Covenant and the recovery must be for the whole sum. Thus where the Covenant declared upon was to pay £10 a year for carrying goods and the breach assigned was a failure to pay for so many tons and one hogthead the assignment was held to be bad. The Covenant would not support the declaration for the Covenant was not to pay for a hoghead or a fractional part of a ton. Had the Covenant

covenant been to pay at the rate of £ 10 per Ton
the declaration would have been good

But in the covenant to pay so much
per Ton if the Def^t will enter a remittitur as Salk^o 658
to the legal and fractional part of a Ton he may ^{Post. 106,}
proceed and have Judg^t as to the rest But if he
does not enter a remittitur the Def^t may ^{1 Siderius 521}
have Judg^t on q^{uod} demum^r, or he may have a
writ of Error after Judg^t ag^t him.

Readings of the Defendant. —

There have been a few instances in England when
the Def^t has pleaded in q^{uod} tenet that he has not
broken his covenant. In Com^o this has lately
been a very common practice. It never
received the sanction of the Court but passed ^{2 Vent^s 100}
"Sub silentio." But I take it such plea ^{2 B. & P. 1312}
can never be good. It always submits q^{uod} — ^{8 T. Rep. 278}
bond of Law to the Jury. As when the decla- ^{2 Altos. 33}
ration states a breach of the covenant of D^o — 311.
Siderius. The Def^t replies that he has not broken
his covenant. Now he may claim that he
has not broken his covenant. Because he has a
good legal title, or because there was a defect
in the covenant. In short any point of Law
may, in this way, be left to the Jury. And
besides there is no direct issue; there is an alle-
gation and a denial. but no fact left to
the Jury. It is

It is laid down generally in the Books, that
 that 303 where the covenants are all affirmative the
 2d. Dig. 305 Deft may plead performed in general terms,
 i.e. that he has performed all the acts that
 he was by the covenants bound to perform -

But this rule is not laid in the unequal
 if it be in which it is laid down. It is
 true when applied to those cases only where
 the thing covenanted to be done are in g^o
 into, as to kind or number. I take it that
 the general rule is directly the reverse, and that
 this is only an exception to the rule. Thus
 10. 11. 375 where a Sheriff covenants to return all writs,
 4. Bar 91. and is sued for breach of this covenant he may
 shew in Pleading in g^o terms that he has returned all
 writs - 9 writs. For in this case your promise the acts
 to be done are indefinite in number. So
 if the covenant were to perform all the duties
 of his office he might plead generally that he
 had performed all those duties. For it would
 be impossible for him to recite every act of
 his officinal life, and shew a list that there
 were all the acts he was bound to perform
 by his covenant. But he cannot in these
 cases plead generally that he has kept all his
 covenants, for such a plea would involve
 an indefinite number of law questions.

Of the

If the Covenant be to do any number of
specific acts the Covenanted must plead
performance of each of these acts specifically

This then I suppose is the gen. rule and
that the one already given is merely an ex-
ception to it. Thus when the Ex. Cov-
nants to pay all the legacies he cannot plead *Levinz 303*
generally that he has paid them all but he must *Salk 498*
plead specially that he has paid each one of *15 Rep. 753*
them. So if A covenants to convey, hold
all the lands which he holds in fee simple
he must when sued for a breach of this co-
venant plead as to each parcel of the land
which he so holds specially that he has con-
veyed it

And it is a gen. rule that a plea of
performance when drawn in the words of the
Covenant is ill. I give the rule thus be-
cause I find it so laid down in a modern *Book 1453*
case. But I think this rule will not hold
in all cases. For the Deft. may plead
more in the spirit of the Covenant in some
cases than by using the words of it

I have already observed that the rule *book 575*
as to pleading generally the performance of af- *15 Rep. 753*
firmative Covenants applies only to one class *book 749*
of cases. And it is then allowed only for the *Q. 10*
sake of avoiding prolixity. And *book 643*

85 Rep 459

2 Wilson 11

32° 535

104 Rep 482

130 Rep 040

28 Bar 772

And the same mode of pleading is allowed in applications on bonds where B particularly alleges a negation of breaches would tend to prove it is where the number of breaches is numerous and multibarious. So where the covenant in the bond was not to sell certain articles within certain limits, on a suit for breach of the covenant the replication stated that the D^{ft} had sold to A and B and also to divers others; this was held good.

Co Litt 303

60 Eliz 332

22° 691

1 Inst 303

Cooper 570

4 Bar 82

22° 91

But where some of the covenants are void the covenanted cannot plead performance of these ^{generally} ~~generally~~. The reason of this rule is that such a plea always supposes that some particular act was by the covenant to be performed whereas in this case the performance of the covenant depends on the C^{or} covenants refusing to act. Where then the covenant is not to do and act and the plea is that the D^{ft} has kept that covenant the plea is bad. But this being merely a defect in form is cured by a verdict. The defect can only be taken advantage of by a special demurrer.

Hob 13

1200 850

But where the negative covenants are void, on the face of them, and the affirmative covenants are good the D^{ft} may plead performance specially of the affirmative covenants and not notice the negative ones.

for they are a legal nullity. Thus when a
defendant pleads covenants among other affirmations. 1st. That he
will things not to execute certain process & - notes -
is said for breach of his covenants he may
plead specially that he has performed each of
the affirmative acts without noticing the
negative covenants.

When the covenant in the deed is in the
disjunctive the Deft must show in his plea
which part of the covenant he has performed 1st. 303
By a covenant in the disjunctive is meant a cov
enant to do one of two things. To do either is
a performance of the covenant. As where A
covenants to convey to B black land or pay him
100 Dollars. It is not sufficient here for A to
plead that he has conveyed or paid the money but he
must show which he has done. 8 Coke 133.
Ely Dig 305.

There is a Contrariety of opinion in the Books
whether pleading contrary to this rule is matter of
form or substance. In Cro Eliz. It is held - 232
matter of substance and so it is in 2d. Demurrer 4th Ed. 91.
In Cornys "it is said to be merely matter of form. 3d. Ed. Dig 82
I think this last opinion correct. For 2d. 84
Such a plea contains substantially all that is
necessary. I think it merely defective in point
of form. For if the plea is true he has done
all that was required by his covenants. Old Edition

When

Hoback 97
 D. m. 107.
 Dye 220
 9 books 25
 42 bar 92
 60 1/2 500.

When one covenants to do that the performance of which is matter of Law, as to execute a Deed, suffered as recovery he the covenantor must not only plead the performance specially but also "quo modo," and that he has not only done the thing but in what manner he did it. The manner is matter of Law and must be pleaded before the Ct. But where a plea of payment of a bond there is no need of stating the manner for it is a mere question of fact and not of Law.

And the rule is universal that where the covenant is to do an act that must appear on record the plea must be special and state the manner in which the act was done. There are two reasons for this rule. 1st The manner of performance is matter of Law. 2^d The matter must appear of record and of this the Ct. must judge and not the jury.

Plea in Bonds of Indemnity. This is the most difficult of the Defs. pleading in Covenant broken. The distinctions are founded in reason but the reason is not at first obvious. In actions on bonds of indemnity the Def. may sometimes plead "non damnificatus" i.e. that the Def. has not been damaged; in others he must plead specially that he has saved the Def. harmless, and in what manner he has thus saved harmless.

The difficulty is to distinguish between these cases. If the Covenant be to discharge or acquit the Covenantor of any thing as stated in the instrument, (as should such a bond, now said "non damnificatus" is not a good plea. As if the said joins the debtors in giving a K. R. and who then said gives the said a bond ~~to discharge~~ to discharge or acquit him of any damage arising from that debt "non damnificatus" is not a good plea for the principal when sued by the surety. In this case the Covenantor must plead that he has, lived be and then in what manner

260 K. 4^o

Carr 374

1 Saunders 174

C. 433

D. 114

10037

page 281

C. 303

D. 634

3 Wilson 136

1 Saunders 117

5th Ed. 307-10.

But on the other hand if the Covenant is to indemnify and save harmless generally "non damnificatus" is a good plea.

The reason of this distinction I take to be this. In the former case the Covenant was to discharge or acquit in the latter to indemnify and save harmless. In the former case the words imply that there was some act to be done. The specific act must then be shown. But in the latter case no act is necessary. It is sufficient if the Covenantor be not damaged. This tho' an artificial reason I take to be the true one. Again if the Covenant were to discharge or acquit the Covenantor or surety, of all damages costs, charges and trouble that might accrue to him in consequence of the becoming

I have observed that when the covenant is to indemnify, and save harmless, "now damaged" is a good plea. But here if the Deft will plead affirmatively that he has done it he must then "quo modo". So in the other case mentioned when the covenant is to acquit or discharge of all damages, costs be which may accrue "now damaged" is a good plea. but if the Deft will plead affirmatively he must plead "quo modo" generally when "now damaged" would be good, yet if the Deft will plead affirmatively he must specially and "quo modo".

36th 3⁶
D^o 4²
C^o J^o 303
D^o 634
C^o Eliz^g 916
Page 231

If the covenant be for an act to be done even by a stranger the covenantor must plead specially provided he would be obliged so to plead were the act to have been done by him self.

C^o J^o 559
D^o 500
1 Shaw 1
C^o Dig^d 305

When the Deft pleads "now damaged" he has a right so to do a replication consisting of a general traverse is it. The replication must show the special damage. The Deft must alledge a special breach or no breach appears. So it is not by any means universally true that where one party pleads matter material that the other may join issue upon it. Indeed it is never the case when the opposite party must make out a special damage. In the case which this rule contemplates there would be no matter of fact submitted to the Jury.

12 Vin 83
15 D^o 444

L A

A Covenant in one Deed is no bar to an action on a Covenant in another unless the former is in the nature of a disclaimer or a release. *2 Vent 217* only gives an action on the Covenant. But a *Salk 373* disclaimer in a subsequent Separate Deed may be pleaded in bar to an action on the Covenant *D. - 623* and so undoubtedly may a release. But the second Deed must appear to be entered into as a release *3 Salk 398* and contain proper words of disclaimer or words amounting in legal effect to a disclaimer or release. If then the Deed declares that the Covenant shall be void on the happening of a certain event, or when there is a Covenant never to sue, which amounts to a release in Law.

Thus I suppose the Lessor Covenant in a Lease to pay 100 Dols rent, and the Lessor in a distinct instrument, Covenant that the Lessor may retain 100 Dols. for repairs; this last Covenant is no bar to an action, for rent on the former. But if the Lessor sues on the Covenant and recovers the whole rent the Lessor may recover the same amount on the Covenant of the Lessor. The second Covenant here contains no words of disclaimer or release and no words which amount in Law to a release.

2 Vent 734 But one Covenant may be pleaded in bar *8 D. 483* to an action on another Covenant in the same Deed. And the whole Deed being one entire.

Contract must be construed together. Thus if the 6th Rep. 734
 Lessee covenants to pay 100 Dols rent and the Lessor 8 D. 483
 in the same Deed covenants that the Lessee may 12 Vin. 150
 retain 50 Dols for repairs the Lessee may on an Ass. Dy. 306
 action for rent plead that he has paid 50 Dols
 and the latter covenant in bar of the action
 for the remaining 50

There are certain Covenants which require
 a distinct Consideration. By these I mean
Covenants Joint and Joint and Several

If two persons covenant jointly and severally
 the Covenantee may sue either of them, or he
 may sue each of them in separate actions
 or he may sue them both jointly

So also if three covenant "ut supra" the - 9 Mod. 20
 Covenantee may sue in the same way - 10 Mod. 238
 But he cannot sue two of the Covenantors joint 3 B. Rep. 482
 by omitting the third. This would be considering 3 B. Rep. 698
 the Covenant partly joint and partly Several. And page 234
 the Contract must be treated as altogether joint or
 altogether Several

On the other hand if the Covenant be joint & several, or
 only all must be sued. This rule I suppose that 2 Vin. 199
 the Covenantors are all alive. Salk. 393

If there are two or more joint Covenantors all
 must join in an action as 2 B. Rep. 280
 Covenantors might be doubly charged. Neither of 2 B. Rep. 1140
 them,

them has in this case any separate demand. And
 5 Coke 18th is a first principle that the right of action
 encompasses the demand

And where the right of the covenant is
 joint, if one of them dies the sole right rests in
 his Eliza 729 the survivor. The representation of the demand
 10 B. & P. 448 cannot himself sue nor can he join the survivor
 1 East 497 nor. The ultimate right of property does not
 rest in the survivor but the right of re-
 covery does.

Where one covenants with two or
 more jointly, and severally (in these words) the right
 of recovery is in some cases construed to be joint
 and in others several. This is the rule & dis-
 246
 2 B. & P. 110 tinction. Now if from the covenant it appears
 5 Coke 18th 19 that the interest was intended to be several, the
 D. 7.8 right will be considered several and each may
 177 sue. But if it appears from the instrument
 10 B. & P. 578 that the interest was intended to be joint, all the
 158 covenanted must join in the action, notwithstanding
 184 the form of the covenant.

So if one covenants with Black and B. and in the
 same instrument White and B. and cove-
 nants with both and each of them, as to both
 subjects, their interest is several and each may sue
 & have interest in the covenant as it respects
 Black and A has no interest as it respects White.

So also if one covenants with A and B the

pay them £100 to be equally divided between them
 their interest is severed and each must sue. *See Eliz. 731*
 It is no more than a covenant to pay each of 10 shillings and
 them £50. And in this case each may sue *See 100*
 out the covenant as being a separate covenant *See 100*
 to pay him £50, without joining the covenant to
 the other covenantee

I have already remarked that if the interest
 appears from the instrument to be joint the co-
 covenants must join in the action, *See 18. 19*
 viz. Black and to A and B and enters into a co-
 covenant with them and with either and each of *See 100*
 them they must join in an action for breach of
 this covenant for the interest is joint, the right *See 100*
 to sue always depends on the interest *See 100*
as the right is not confined to interest See 100
See 100

It follows then that the two or more co-obligors
 may bind themselves severally for the same thing
 yet two or more co-obligors cannot have several *See 100*
 tions for the same thing. Two or more co-obligors
 cannot have distinct & separate rights to enforce
 the same duty

If two or more co-obligors might sue sepa-
 rately the obligor might satisfy the covenant to
 many times. For each moving in his own right
 a recovery by one would be no bar to an action by
 another. But when two co-obligors are bound in a
 covenant a recovery out of one is a bar to an action
 against the other.

But if

But if two covenant jointly and severally each may be sued for the neglect of the other, tho he is not himself in fault. As if A and B covenant jointly and severally that B shall perform such an act. A may be sued alone if B does not perform the covenant.

When two or more are jointly and several
 1 Coke 40 by bond a recovery agt one is no bar to an
 Croft 73-4 action agt the other. Nor is the taking of one
 3 East 231 in Ex^a a bar to an action agt the other. But a
 5 Coke 80 recovery of satisfaction agt one is a bar to an
 * 2 men is not the taking in Ex^a a action agt the other. Taking in Ex^a is a satisfaction while before
 satisfaction in law or if discharged by consent or neglect of the creditor
 sup page 207 and not by depth or operation of Ex^a page 471
 " " " " 213
 Vol 2nd 55-6 not liable ^{to him} on the covenant. But if one of
 1 East 400 two joint and several obligors did the covenant
 1 Selw 482 may sue either the survivor or the Ex^a, in this
 Vol 4th 64 case each of the covenantors was liable and that
 liability will extend to their Ex^a.

Land 255-8 If two covenant jointly or severally the word
 Croft 832 "or" is construed as "and". For it is in the dicta
 1147-70 of the covenantee to consider the covenant either
 1147-70 joint or several and this makes it a joint and
 1147-70 several contract.
 1147-70

If two or more covenant jointly and several
 Salt 308 ally and one of them is made Ex^a of the covenantee
 8 Coke 136 this is at Law a discharge of the rest of the cove
 1147-70 nants. For at Law making a man Ex^a is
 Vol 2nd 135 a discharge of what he owes the Testator. Each

of the covenants in this case and the whole Debt
the whole Debt is then discharged by making one
of them Ex.rd

And the rule is the same in Chy.
as between the covenants and the covenant ut. 306 Chy 340
representations. Tho if there are not a sufficient 200 Chy 354
to pay the Debt. Chy will compel the Co 200 Chy 311
venants to perform. A Ct of Equity will 9 Mod. 62
a payment in such case on this ground. It 100 D. 515.
considers the Covenant as Regate of the bond or 100 D. 135.
the amount of the damages arising from the
breach of the Covenant. But being only a
Regate his rights yield to those of Creditors.
But the Covenant will not in such cases be
enforced in favour of the representative.

If an instrument begins "We Covenant &c" and 100 Chy 323
is signed by one only it is binding on him as an 200 Chy 32
sole and several obligation.

If two or more bind themselves in an obliga-
tion, it is joint of course unless there are words 200 Chy 1203
used implying a several duty. If a Note begins 300 Chy 697
"we promise to pay" it is joint. So if a Covenant 100 Chy 236

But a Covenant beginning "I Covenant &c" 100 Chy 70
and signed by two is a joint and several obliga- 200 Chy 809
tion. It is understood here to be meant to be taken 100 Chy 130
distributively as I. A. and I. B. covenants. If I 100 Chy 143
do not find implied a several duty, it is an excep- 200 Chy 1544
tion to the last rule. Finis 100 Chy 40

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Action of Account

by J Gould Esq^r

It is unfortunate for us in this Country where this action is so common, that it has of late years been entirely disused in Westminster Hall. The C Law action of Account has then yielded to a Bill for account in Equity. Indeed in the last action of Account broⁿ in Westminster Hall (the case of "Godley vs Sanders" in 1780), both the Judges and the Counsel were so much perplexed that it lay along 14 years.

This is an action sounding in Contract and founded on a Contract either Express or implied, that the Promisor will render his reasonable acc^t 17th count. At C L this action lay only ag^t D^o — 90 three classes of people viz Guardians in Searge Hilson 1-2 Bailiffs and Receivers. It lay indeed at C Law between joint merchants, not as a distinct Account at all, but as received. It lay ag^t the Guardian in favour of his Ward and ag^t Bailiffs and Receivers in favour of their principals.

By the 4th of Anne and Stat^{ut} Gen^{al} in 1704 out in Common may have this action ag^t 17th count his Co-tenant. The D^o is not here liable in the 17th character of Co-tenant, but the Stat^{ut} considers him as Bailiff to the other. At Com Law if one Co-tenant took more than his part there was remedy.

Let Court Law this action lay only between the
 Ronsdight original parties and not in favour of any third
 party personal representations. The reason was that
 that 89.90 the action was founded on a supposed personal
 debt 17. Privately between the parties so that each was sup-
 posed to know the disbursements and receipts.

There was an exception in favour of the Exchequer
 of a Merchant deceased but not against him. The
 action of account would lie in his favour or
 the survivor but not against him by the survivor
 for the Exchequer was supposed not to have such a
 privilege as to be able to make up an account
 but the survivor had the means of doing it
 himself. This exception was founded on the
 Law Merchant in favour of trade and traffic.

By the English Statute of Westminster 2^d
 13th Edward 1st 35th Edward 3rd and 31st Edward 3rd
 that 89.90 this action was given to the Exchequer against Guardians
 Bailiffs and Receivers. These Statutes gave the ac-
 tion to the representatives of those entitled to
 the action of account and they also gave the
 action to the representatives of the original Exchequer.

That the Statute of Chichester extends this ac-
 tion to and against the personal representatives of
 104. Guardians Bailiffs and Receivers and also to and
 17. against the personal representatives of tenants in
 common and Joint Tenants. So that as the Law
 now

now is the action of account may be brought by or against the representatives of all the original parties who were entitled to the action.

In every case but that of Guardian the Debt is charged as Bailiff or Receiver or as both. At C. & E. the Joint Tenant or Tenant in Common is not a Bailiff or Receiver for the other. But he is made so by the Statute which allows the action of account and as such he must be declared against. Some joint Merchant is declared against as received. The several Statutes which I have mentioned have not extended the action so that it may be brought against any other than a Bailiff and Receiver. But they have brought others within the description of Guardians who were not so at Common Law. The form of declaring is still the same.

When I say however that the Debt is not charged as Joint Tenant or Tenant in Common I do not mean that the Declaration does not state that he is Joint Tenant or Tenant in Common. This is regularly to be done in every declaration. But it is done merely to show how he is a Bailiff. The Declaration calls on him to account while he was Bailiff and then states that he was Bailiff being Co-tenant. So when the action is against one Joint Merchant the writ calls on him to account as received and then states the Co-partnership and that he was thus received.

Yours

There is a distinction to be observed between
 a Bailiff and Receiver. A Bailiff is one who
 receives property for another to improve for
 that 172 the owner and to account for it. He is calc-
 ulated to wages for his expenses and services.
 That 173 And a Bailiff is bound to account not only for
 what he receives, the profits which he has made but also for
 what he might have made by reasonable
 174 diligence. Otherwise it would be good and
 could digest counting to state his own negligence, and thus
 175 he would exonerate himself by a breach of trust.

A Receiver is one who has received money
 for the use of another, to account for it but who
 has no allowance for his trouble. He does not
 receive the money to speculate with it and
 that 176 make a profit. That if it should receive
 177 the cash and does not pay it over he is liable
 could digest in an action of account ad receiver. He does
 not 178 not receive the money to speculate with and
 thus make a profit nor does he receive a com-
 mission for receiving and paying over the
 money. So if it receives money for B which was
 due on a bond to pay over to B the receiver
 and liable as such.

That 179 But to the point that the receiver has no
 180 allowance and is not accountable for profits there
 could digest is an exception in the case of Bank Merchants
 181 But the rule with respect to them is found in
 the Bank Merchant.

It follows from the distinction between Bailiffs and Receivers, that a Bailiff cannot be subjected in 172^d is a declaration charging him as receiver. for he holds 17^d would thus lose his allowance as the receiver has 17^d 19^d none.

The more a Stat^e in this State, which gives the action of account to Joint, Several, & Grants in Common and Co-partners and to and ag^t them Stat^e 28. Personal representatives. Expressions have not this action in England either by C^l Law or Stat^e.

Our Stat^e likewise allows this action, in favor of all residuary Legates, ag^t the Ex^r. The reason why the Stat^e gives the action of account to residuary Legates only, is that the amount of the Legacy is here uncertain; in a few other cases, certain.

But our Stat^e does not in terms extend this action, ag^t Bailiffs and Receivers. Nor does it give the action to the Ex^r and Adm^r of Bailiffs and Receivers. But our C^l & our own Stat^e is deficient, have adopted the English Stat^e. This practice has passed "Sub Silentio".

I have already observed that this action is founded on breach of Contract. It will not then lie generally in Case of Goods. A cannot therefore bring account ag^t B, for coming dishonestly on his Land and taking the profits. There is an exception in England in favor of the Curator. If the thing is diffused he may bring an action of 1 Inst. 172^d 1 Vent 430^d 1 Inst. 484^d
a c

account. So there is an exception in favor
 Com Digest of an Infant. He may elect either to sue in
 the 1st or 2^d account or in person. The ground of the rule is
 11 Coke 89. Infants and Infants is this. When a person for
 2^d and 3^d enters on his land and takes the profits,
 De. 342 he may, if he chooses, consider him a Guardian
 and sue him as such. And it is to be
 no defense for the Defendant to say, that he is no
 Guardian to the Infant.

It is said in some of the Books that an
 action of account does not lie, for a sum cer-
 tain. This rule has formerly occasioned much
 Com Digest perplexity. But comparing it with prin-
 ciples and cases I think it incorrect as laid down
 the 1st 3. The true rule I take to be that one can be
 1st De. 19. charged as Bailee in an action of account for a
 2^d De. 70. sum certain. Thus if I deliver 1000 Dollars to
 A to vend with an account f. d; I can't sue
 A for the 1000 Dollars. For if I remove that sum
 and there were profits made I might afterwards
 sue for them. Besides a loss may have been
 sustained, so that I am not entitled to recover
 the 1000 Dollars. There is no specific sum to be
 recovered. But I take it to be clear that if the Plaintiff
 Holt 200. sues a sum of money and an ac. the Defendant must
 maintain an action of ac. charging him as Receiver.

1st De. 172. So if I employ A as an agent to receive 100 Dollars
 for

for me on a Note and he refused to pay it over to me. I may sue him in account as a receiver, *Bar 20, 31.*
And indeed it is a great rule that when one receives a sum of money, to account for it the Com Digest action of account will lie for that sum if there be a debt A4 is either an express or implied promise to act as receiver.

If A receives money to be delivered to C and Digest B on a certain event. But the happening of it A4 that event may sue him as receiver. Thus if *Whole 110* I deliver money to A to be delivered to me and *Bar 110* if he find my creditor and pay it to him I *Bar 118* may sue him in account. But if he has paid *Whole 103* it to my creditor it is good accounting.

If money is received by A for the use of B *Whole 112* an action of A/C lies in B's favour. But B must *Whole 120* state in his declaration of whom the money was Com Digest received. For if he declares generally it will be *See A4* understood to have been received of himself.

But if I deliver money to A to be delivered to B for my use and A delivers it I can't sue Com Digest B in an action of A/C for there is no privity of *See D* contract between B and myself. I may as the *Whole 118* case may sue him in *Indebitatus* or *Assumpsit* or as *Bar 100*.

If a Bailor of Goods consents or refuses Com Digest to deliver them A/C will not lie. tho' *Prover. Det. Act. to D* inued on some other action would. The is not a *Bar 119* *Bar 219*

Article 110 nor does he receive them to account,

The Court be charged as receiver for the property is not money. But if it is money in the common cases of bailment it is not received to account for.

Com. Sec. 2. Account will not lie agt. a receiver for the Defendant's action is founded on contract.

The action of A/C as I have observed is Article 118. founded on a special privity between the parties. And that on this principle if A bailee make a default A does not maintain this action agt. the Defendant, there is not that privity between them which the Law requires.

This action will in no case lie agt. an Infant. And tho an Infant is liable for his torts and some of his contracts (eg. in necessaries, Stat. 172) he is never liable in an action of A/C. For in Com. Dig. 2b addition to the great objection that an Infant is unable to contract the Law supposes him in estate of accounting (how want of discretion?) And the very object of this action is to compel a person to account.

If he who receives property of another expressly promises to account, the promisee may maintain either the action of Account or Assault. It is founded on the promise, & account lies at the Court's by proof of property received to account for, and Assault by breach of the promise. It is said by Huby 164354. So with the debt to bring the promisee

he shall not in this action be allowed to travel in
to the a. c. that is compel the Def. to account
for the articles received but shall confine him-
self to the special damage sustained by the Def.
not amounting. And if this is the true rule of law
it will not be a bar to the action of a p. c.
lost afterwards. The first is an action for special
damages. And the second for not amounting.

In a late edition of Baron the rule laid down by Lord Holt is questioned but no case is cited. But the rule appears to me a reasonable one. For I doubt if we have in England before a Jury account can be gone into. The thing may be possible but it would be very difficult and for this reason a c. is always settled by a Judge. The case in which Lord Holt expressed his opinion was one at New Prius. and I know of no other in the English Books.

If one says I did acknowledge the receipt of property to account for the Def. may have either an action on the Debt or an action of a p. c. at his election. This is not a case where the Bond meets the simple Contract. The object of the Debt is to compel an a. c. and furnish an additional remedy the remedy is cumulative. 1 Rolle 118,
60 Eliz. 644
Rolle 219
Do 223 425
20 Rep. 497

If one finds the property of another a. c. will could just as well lie up to the finder to move it. There is no special remedy between the parties. H. 118

after demand made is the proper action At any
rate a/c will never lie

In an action of a/c if the D^{ft} prevails there
are always two Judgments. First if the P^l prevail on
the first issue there are always two Judgments. The first
1st Willm 99 final Judgt is in his favour or not. The first
1st Mod 42 Judgt is that the D^{ft} rendered to the P^l his reasons
Com Dig 2nd able a/c "ex quod computat" on that Judgment
See 1st E 15 and now are appointed by the Ct to take the
a/c between the parties.

When the auditors are appointed the parties
appear before them and they proceed to take the
a/c. Having thus taken the a/c they make
3rd Com 104 their award and return it to the Ct who appoints
1st Coke 40th them. On this award final Judgt is rendered
1st Selw 7th 9th. The award is like the verdict of a Jury merely as-
certaining the facts. If the award is in favour
of the D^{ft} final Judgt is rendered in his favour
"quod computat" that he received. If the award be agtst
him Judgt is rendered accordingly.

As now a Stat^e in this State the parties are
allowed to testify before the Auditors, and each
Stat^e 28, party may by the opposite party be required to
testify and if he refuse he may be imprisoned by
the auditors until he will answer. This is useful
to answer is in the nature of a contempt of the
Ct who appoints the auditors.

Butler 806

If the D^{ft} refuses to come before the auditors,

And thus on being their refusal to produce his a/c. the Auditor must award the Debt whole or in part. The rule is the same at C. Law only the Ct award the whole demand on the Auditor returning the facts in such cases.

3rd Wilson 117

Comm. Digest. Sec. 15

By our Stat^s if the Auditor find a balance in favour of the Debt^r they must award and sign, in award that the Debt^r recover the amount of the award and his costs. But in England if he C. Law in a/c, the Debt^r could only recover his costs in such case. But by a Stat^e in a/c, in Equity he may recover as in this Country both damages and costs.

2nd Will. 150

1st Barⁿ 18

And I would here observe that the proceedings of the Auditor are not before the Ct nor makes their continuance. They meet out of Ct and at a time and place of their own choosing and left the Ct appointing them fixed the term.

There is some contradiction in the Books respecting what may be pleaded in bar to an action of a/c. This arises from the fact already mentioned that the action is out of Court in England and so the forms be are not well understood. Some principles however of this subject are well settled. It is a great rule that it is competent for the Debt^r to plead in bar of the action, any thing which goes to show that he is not bound to account with the Cred^r.

Yates. Rolle 131.

This Plea in Bar must be always before the
 4 Bac^o 20 first Judge To an action of ass^o charging a free
 bond Digest for a Guardian Bailiff or Receiver and Guardian
 Sec^o 4. and Bailiff or Receiver is a good Plea in Bar to
 the action. These Pleas are the best Pleas in
 these several Cases.

So also a release by the Def^t & all ac-
 4 Rolle 123 tions is a good Plea in Bar, for if he has released
 4 Bac^o 85 all actions he certainly cannot maintain an ac-
 tion of account.

It is also competent for the Def^t to plead
 4 Rolle 82 in Bar an award by Arbitrators, that he should
 4 Bac^o 85 be discharged, and that all actions. This is an
 extinguishment of the Def^t's right of action.

It has also been determined that a Plea
 4 Rolle 122-5 that the Def^t received the money he delivered over
 4 Bac^o 830 to a stranger, and that he has done it is a good
 3 Wilson 114 Plea in Bar. If he receives it to deliver over to
 2 - 115. a free bond Digest. And he was never liable to account, tho' if he
 Sec^o 5 did not pay it over he might be liable in some
 other action.

All these Pleas you perceive go to show
 that the Def^t ought not to ass^o. But why are
 such Pleas the only ones that are good in Bar?

The reason is that a Plea in Bar ought always
 always to prevent the Judge's "quod Computat"

4 Rolle 7 And any Plea which does not show that the Def^t
 4 Bac^o 85 ought not to account is not good in Bar.

Thus

That a plea of Payment is not good in bar,
for the plea admits that he was once liable to a/c
and Payment is not accounting, and the express,
or implied promise to account, can be discharged
in no other way than by accounting - "Dine";
has not, it is said above, contradicted this last sentence?

But a plea in bar that the D. has paid
by account is good. This admits that the D. was
once liable to account but shows that he has paid - 3 Wilson 113
and does not go into the bar. The bar is fulfilled his contract. Can Digest
The very object to be effected by the action of a/c
is already accomplished. If the a/c has already
been entered the D. has paid, under the ballance
found due to him in this action. His proper reme-
dy, would be "indemnified Contribution."

Upon a plea of fully accounted, you can't go
into the items of the a/c to show this fact. This
would be going into the a/c, to show that you ought
not to go into it. The fact that you have account-
ed must be proved by some other evidence. 1 Root 425.

It is a good plea that if the D. shows, or ad-
mits, that he was once liable to account no plea
in bar is good but "fully accounted" as a release or
what amounts to a release (i.e.) something equiva-
lent to a release as an award of fact that he
Before the Ct. he may plead in bar that he was D. - 3 Wilson 73
never liable. All this plea in bar of D. D. 113
up to 114

might be moved may be, who before the Auditor,

3 Willm 113

Do 114

2d Willm 146

Do 150

And all defenses but show that then that the Debt was never liable to account must be specially pleaded. There may be given in evidence under the gen^l issue, but it does not follow that the Debt was never liable. A plea therefore of "fully accounted" must be specially pleaded. It cannot be given in evidence under the gen^l issue, as as it admits that the Debt was once accountable, it is inconsistent with the gen^l issue. So a release or any thing in the nature of it must, for the same reason be specially pleaded.

And the Court "quod Computat", before the Auditor the proper way, plead and take issue either in Law or fact. It is said in England Do 117 that the Ct must tie the issue. But that Cro Eliz 84 must mean some special issue. And if the Do 800 issue is "nothing in answer which is usually the Cond Digest Case the Auditor must tie it, the Ct cannot, And if the issue is in Law the Court must tie it. And can the Auditor tie any special issue?

This rule so far as it relates to special issues in fact is not adopted in Conn. the Auditors have tied all issues in fact, but not those in Law.

And the good rule is that what can be shown by the 82 is in Law must be pleaded before the Ct and not Do 117 before the Auditor. And the rule is that the Debt

Def. must plead any ground ^{to} plead at the earliest opportunity. He must not lie by until he come before the Auditor, and then plead in bar what he might have pleaded "in limine", and then ^{the} Spec Second Bly. would express. So that is pleadable in abate must be pleaded in bar to the action and not afterwards.

Another good rule is that nothing can be pleaded before Auditors. Contrary to what has been pleaded and found before the Ct. This would be contrary to the Sdg. "good Computat." So in a/c agt. a Bailiff the Def. can't plead before audit. as "new bailiff" the Sdg. "good Computat." implies that he was Bailiff. So before Auditors the Def. can't plead a release. This would have been good in bar, and the Sdg. "good Computat." uniformly supposes that there was no release. So on the same ground he cannot before Auditors plead that he has "fully accounted", nor can he plead an award of arbitrators that he should be discharged from this action.

On the other hand it is a good discharge or rather good accounting, before Auditors to plead that what is not pleadable in bar shows that the Def. ought to be eventually liable. This rule supposes that he ought to be eventually liable and that he could not make use of his defence before the Ct. He must therefore be mitted

1stth 89^a ^{at 6} permitted to use it before the Auditor, for it
 Rolle 124 would be a reproach to the Law to suppose
 Com Digest that a man should never be permitted to use
 1stth 89^a his defence when he had a good one. Suppose
 Com Digest for example his defence is that the property Com
 1stth 89^a was committed to him and for which he was to ac-
 was lost at sea without any fault of his. This
 the no bar to the action would be good ac-
 counting and might be pleaded ^{before} the Auditor
 He was once liable to account, and the not now
 eventually liable while he is not discharged from
 accounting. So if the defence be that the prop-
 erty was lost by public enemy, who into is the
 4th 84^a same So if the property has been lost by rob-
 1stth 89^a bery without the Def's fault, he may plead it
 Com Digest and this is good accounting and the proper way
 1stth 89^a of proceeding is to charge the Def with goods to
 1stth 89^a the sea &c. This is therefore strictly speaking good
 accounting.

2nd 100^a But a plea by the Def that the
 13th 21^a property being perishable was likely to be lost
 Com Digest and that he sold it on credit and the purchaser
 1stth 89^a was a bankrupt, is not a good plea unless
 1stth 89^a he was specially authorized to sell on credit.

A Bailiff in accounting has an allowance
 for his services and all reasonable charges and
 1stth 89^a expenses. This is not however true as to the
 1st 24th Bailiff in his own wrong. As to the 4th

Notionally enters and takes the profits of the Land of an Infant. If the Infant elect to sue him in *Condictio a/c* he has no allowance but must account *Stat. E 13* for all the profits he has made or might have made by reasonable diligence.

And if he is entitled to no allowance the owner the property to account for, not to *Stat. 172* use or take any trouble with. If he were *Condictio* bound to do these things he would be a Bailiff, *Stat. E 13*. If the property is lost without his fault, this will be good accounting when stated.

I am now to mention certain rules respecting this action which are introduced by our *Stat.* nearly. When the action of *a/c* *Stat. 28* is brought before a Justice of the Peace, he is to issue. He never appoints auditors. This the *Stat.* does not authorize. But after the Judge gives judgment he provides himself to take the *a/c*. Our *Stat.* also provides that in case of Book Debt where the demand exceeds *17* *Stat. 28*, only the Superior County Ct. may appoint Auditors and proceed as in the action of *a/c*. These two actions are extremely alike.

Further when Judgment on *a/c* is entered by the Ct of Common Pleas, on an award by Auditors no appeal lies whatever may be the demand.

In England is an action of *a/c* the *Diff. B. & C. 437*

353 and 381 D

18 Bae 107

Walton at Park

nesh, 228, for that is the place where it is done.

is not entitled to compel the Deft to discover or produce his Books, or Papers or to take his oath. That may however be done in Chy and for this reason, 228, for that is the place where it is done.

On the other hand one Stat^l virtually gives the Auditors all the powers of an English Ct of Chy. They can compel the parties to testify, or produce their Books and Papers. Our action of a/c is therefore as remedial as a bill in Chy. We are not therefore generally compelled to seek relief in Chy.

There is however one class of cases in which our Sup^r Ct has determined that the action of a/c will not lie but that the parties must resort to a Ct of Equity, i.e. where the a/c is to be adjusted between three or more persons. This point was determined in the case of Boardman & Co. v. Boardman & Co. in Litchfield County, 3 or 4 years since.

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And the reason of the rule is that the Ct can only adjust the a/c between the parties to the action. And if there are three partners A, B and C, and if debt B and C, the a/c can only be adjusted between A on one side and B and C on the other. B and C would therefore still have their accounts with each other to adjust. So if there were four partners the number of actions must be still greater. But when a bill is filed in Chy they adjust the accounts between all the parties.

H

If either party is dissatisfied with the award of the Arbitrators he may apply for relief to the Ct. in England and Conn.

But for what reasons objections the Court will set aside the award, does not appear to be precisely settled. In England owing to the almost entire disuse of this action, there are few cases to be found on the subject. Some things ^{Report 268} are however pretty clearly settled on this subject. ^{D^o - 413}

If the arbitrators exceed their commission (i.e., 2 Day 110) decide on subjects not cognizable by them this award will be set aside. So if they have made a mistake in deciding on their own principles (i.e., on principles which they have adopted as the rule of their award, (as if they make a mistake in computation) the Court will set aside this award. So likewise if they mistake the Law on a given fact, the rule is the same. So that the award is made by corruption of the Arbitrators, i.e. by fraud or influence the Ct. will set aside the award. I don't know of any other reasons for which the award will be set aside but these cases have all been decided.

The mode of excepting to an award is by a written remonstrance to the Ct. The Ct. will not in genl. enquire at large into the facts. ^{Thirty 353.} But if the mistake in Law appears from the ^{Report 131} face of the award, or from the evidence of the ^{D^o - 201.}

Arbitrators.

Auditors in Court the award will be set aside
 2 Day 116, But when the objection is misbehaviour in the
 and how (as to quality) be the examination is in
 the usual way by witnesses as to the facts

Finis

1807

Delinque by A Court of Equity

With respect to this action I have very few
rules to lay down. It lies for the recovery of a
specific Chattel. Thus far it is in the nature
of a Bill in Equity, i.e. it is like a bill in Equity, 1 Inst^e 280,
and its effects. A debt is not rendered in the first 3d Horn 152
appeal for the value of the Chattel, but for the 6 Inst^e 361
specific restitution of it, but with a conditional 2d Inst^e 45,
because that if the thing itself cannot be had,
the Debt shall pay the value of the article with
the costs of execution which must be ascertained
as in the Debt. If then the Sheriff cannot
find the article he must levy money to the
amount of the Debt.

But as this action is but for a specific
restitution it will not lie for any thing that 1 Roll^e 605
cannot be identified. The Chattel must be 2d Inst^e 46,
with of such a description that the Judge may 6 Inst^e Digest
be for that specific article. Delinque will not 2d Inst^e 46,
therefore lie for £100, or 100 bushels of wheat with-
out any other description.

But this action will not lie for an
aggregate sum of money, as £20, yet it will lie 6 Inst^e 45,
for a certain price of Goods distinctly described 6 Inst^e Digest
worth £20. And so it will lie for a sum of money, Delinque 3,
in a bag or box, which can be identified.
Yrs

an unlawful taking or under Goods is the only action.

The action of Detinue has gone almost entirely out of use in England and I can't learn that the action was ever lost in Court tho it would undoubtedly be here. The reason of its discontinuance in England is that the Def^t might wage his Lan. And another reason was the difficulty of describing the chattel with the certainty required by Lan. These def^t causes are not known in the action of Goods which is much more convenient.

10 Coke 5^a
Cro Jac 244
Yelverton 178
2 Bui 45

Goods is an action which was not known at Common Law. It was introduced by the liberal construction of the Stat of Westminster 2^d 13 Edward 1st. And indeed this Stat is the Decree of all actions on the Case.

Finis

194

1907

Action of Debt

by T. Gould Esq.

The legal acceptation of the word "Debt" is a Sum of money due by contract (and express^{*} contract e.g. by a Bond for a determinate Sum. Note, special bargain be possible). So for a Sum capable of being ascertained. This is generally so.

3 B. & C. 154.
2 D. & R. 152.
1 D. & R. 153.
1 D. & R. 154.
1 D. & R. 155.
1 D. & R. 156.
1 D. & R. 157.

The action of Debt lies in some cases on 2 B. & C. 13 contracts implied (as see next page), but not if 4 Co. 91^a it is said on contracts implied to pay and uncertain 3 B. & C. 155 Sum. E.g. If A sells goods and agrees by word for a fixed price, the action of Debt lies: but if no price is fixed, Debt does not lie 7 D. & R. 550.

The action of Debt on simple contract has been disused in England by reason 1st of the Wager of Law. For what wage of Law is due, — Co. Litt. 155, Co. Litt. 155, 3 B. & C. 341 be. it is the Deft. swearing that he owes nothing, and his countrymen swearing that they believe him. Wage of Law 3 B. & C. 343 is equivalent to a verdict for the Deft.

2^d Because the whole Sum demanded must be moved if any according to the old rule. This rule is not now observed, as see 2 D. & R. 700, 2 D. & R. 1221, Douglas 6. 703 note 18 E. 3 249. 550. I have said that this action of Debt on simple contract page 231 must, has long been disused in England, it however still is, and has lately been revived i.e. Debt on simple contract 2 D. & R. 219.

In some cases Debt lies not on express Sum Flower 182

Senior 200 Simple Contracts e.g. it does not lie agst and
 Chitty 321, Ex. or Ann. There is no indubitable on his part
 Ex. Dig. 173 For the Statute might have waged his law but the
 of Chitty 87, Ex. or Ann. cannot

Chitty 135, 187
 Chitty 321, 10th Ed. 38,
 3rd Ed. 880
 8th Ed. 373
 3rd Ed. 173
 3rd Ed. 173
 3rd Ed. 173

Debt lies on a promissory Note it seems,
 whether it will lie in favour of the Indorsee agst
 the Indorser is doubtful as see Chitty 321, 10th Ed. 312
 The same to be in the nature of an indorser of a Debt

Debt on a promissory Note
 is a contract to pay
 a sum certain in
 and says not due
 being simple will
 lie agst Debt from
 Ex. Dig. 173
 then a sum or
 time or contract
 shall not lie agst
 a Debt for that
 is not a contract
 but a contract to

The action of Debt will not universally
 lie on express Contracts. The rule is that "if
 one expressly promises to pay a sum certain
 for property delivered to his own use, or for services
rendered to himself, Debt lies. It seems generally if
 he promises for another for if the promise be
property delivered to another, or for services ren-
dered to another Debt does not lie as in case of
 the other (Ex. Dig. 173) where a promise was
 made by A to pay an Attorney if he acted
 for B Debt would not lie. Debt lies on a prom
 is on a lien extinguished by the Statute so on a
promise to pay another Debt

3rd Ed. 880
 Chitty 322
 2nd Ed. 21,
 Chitty 880
 2nd Ed. 20

"I take the rule to be that on those promises
 which under the Statute of Grand Jurors are called
indubitable, Debt at C. L. will not lie, tho the
 action of assumpsit will. But on those prom
 is which under the Statute are called "original"
 Debt will lie". Now there must be a Special
 action on the case. Ex. Dig. 173, Chitty 104, 140 193.

Holmes 550
 Note - 1

Ex. Dig. 173
 Chitty 104
 2nd Ed. 193

Debt

Debt will lie where the the person for whose use the promise was made, is never liable at same, *2 Ray, 842*

So Debt does not lie for the payee agt. the acceptor of a Bill of Exchange, he is rather in the nature of a Surety or Guarantor, and is therefore a collateral promisor. The Drawer is the Debtor and liable in Debt. *Quere Chitty 220.*

The rule of Q. Law was that the Plt. in Debt, *5 T. R. 119.* must move the precise Sum. & claim for a nothing. This rule is not now observed in case of Debt on Simple Contract. See *2 B. & P. 1231.* *1 W. Bl. 249-50*

* Debt lies in some cases on implied Contract. *Hobart 200.* *2 B. & P. 114* *Chitty 220* *4 T. R. 598.* *2 B. & P. 14* *4 B. & P. 750* *7 D. 257* *2 D. 263* *6 T. R. 382* *3 B. & P. 448.* *Chitty, 179.*

And sometimes where there is nothing like a bargain or Contract or other commercial transaction from which to imply a Contract, on a Special Stat. where the Penalty is certain there being no Specific mode of incurring the Penalty prescribed. This is the common Practice in England and in Conn. it is a Civil Action. That this is not strictly an action of Debt, or "indebitatus" There has been some difference of opinion with regard to the plea in an action of Debt to move the Penalty in the above case "Not Debt" is a good plea. But whether "not guilty" is a good plea has been questioned. It seems that "not guilty" is a good plea on the idea that the action is in form an action on Contract yet in fact-

fact and "ex delicto" and a plea of "not guilty" proves "not debt" by inference only. Goatsbe-
 La Ray 1500 tion of Debt founded on Specialty "not guilty" is
 not a good plea.

20 Bar 14- Though Debt lies not to money damaged,
 11 R. 100-1 yet when damaged are received Debt lies on the
 20 B. 100-1 Sdgt. For the demand is by the Sdgt made certain
 Hobart 206,

So the action of Debt will lie when an
 20 R. 923 award of arbitrators to pay a sum certain, this
 is in the nature of a Sdgt. - Note 8th

Est. Dig. 190 When the Debt in a Sdgt. is in Cur-
 20 B. 2482 Contra page 156 18 R. 557, 40 C. 2. page 556
 18 R. 557, 40 C. 2. page 556 in the Ex. Debt on Sdgt. lies not agt him
 20 B. 420, 123. So if having been in custody he is discharged
 3 W. 13 with the Jffs. consent, taking in Ex. is a sat-
 4 R. 2482, 123. is action in Law Note 4th

So if good to the amount of the Ex. are
 20 B. 323 taken Debt on the Sdgt. does not lie agt him.
 20 B. 214.
 20 B. 355
 18 R. 557.
 Est. Dig. 190 But it lies if only a part of the amount has been levied
 20 B. 92

As to the proper time for bringing debt on Sdgt. in Ex. & Com.
 In England it is a gen. rule that an Ex. cannot issue
 20 B. 3012 after a year and a day from the time of rendering the
 20 B. 30 Sdgt. And in this case the Jffs. only remedy of Com.
 18 R. 351 Law was by an action of Debt on the Sdgt. by
 original writ. The reason was that after such a
 term payment was returned,

But the Statute Westminster 2nd gave the
 18 R. 133 Jffs. a right to a "dies facias" calling in the Ex. to
 20 B. 304 show cause why Ex. should not issue and was
 18 R. 822
 20 B. 288

after a year and a day the Plff cannot take Ex^{or} ²⁸³ ²⁸⁴ ²⁸⁵ ²⁸⁶ ²⁸⁷ ²⁸⁸ ²⁸⁹ ²⁹⁰ ²⁹¹ ²⁹² ²⁹³ ²⁹⁴ ²⁹⁵ ²⁹⁶ ²⁹⁷ ²⁹⁸ ²⁹⁹ ³⁰⁰ ³⁰¹ ³⁰² ³⁰³ ³⁰⁴ ³⁰⁵ ³⁰⁶ ³⁰⁷ ³⁰⁸ ³⁰⁹ ³¹⁰ ³¹¹ ³¹² ³¹³ ³¹⁴ ³¹⁵ ³¹⁶ ³¹⁷ ³¹⁸ ³¹⁹ ³²⁰ ³²¹ ³²² ³²³ ³²⁴ ³²⁵ ³²⁶ ³²⁷ ³²⁸ ³²⁹ ³³⁰ ³³¹ ³³² ³³³ ³³⁴ ³³⁵ ³³⁶ ³³⁷ ³³⁸ ³³⁹ ³⁴⁰ ³⁴¹ ³⁴² ³⁴³ ³⁴⁴ ³⁴⁵ ³⁴⁶ ³⁴⁷ ³⁴⁸ ³⁴⁹ ³⁵⁰ ³⁵¹ ³⁵² ³⁵³ ³⁵⁴ ³⁵⁵ ³⁵⁶ ³⁵⁷ ³⁵⁸ ³⁵⁹ ³⁶⁰ ³⁶¹ ³⁶² ³⁶³ ³⁶⁴ ³⁶⁵ ³⁶⁶ ³⁶⁷ ³⁶⁸ ³⁶⁹ ³⁷⁰ ³⁷¹ ³⁷² ³⁷³ ³⁷⁴ ³⁷⁵ ³⁷⁶ ³⁷⁷ ³⁷⁸ ³⁷⁹ ³⁸⁰ ³⁸¹ ³⁸² ³⁸³ ³⁸⁴ ³⁸⁵ ³⁸⁶ ³⁸⁷ ³⁸⁸ ³⁸⁹ ³⁹⁰ ³⁹¹ ³⁹² ³⁹³ ³⁹⁴ ³⁹⁵ ³⁹⁶ ³⁹⁷ ³⁹⁸ ³⁹⁹ ⁴⁰⁰ ⁴⁰¹ ⁴⁰² ⁴⁰³ ⁴⁰⁴ ⁴⁰⁵ ⁴⁰⁶ ⁴⁰⁷ ⁴⁰⁸ ⁴⁰⁹ ⁴¹⁰ ⁴¹¹ ⁴¹² ⁴¹³ ⁴¹⁴ ⁴¹⁵ ⁴¹⁶ ⁴¹⁷ ⁴¹⁸ ⁴¹⁹ ⁴²⁰ ⁴²¹ ⁴²² ⁴²³ ⁴²⁴ ⁴²⁵ ⁴²⁶ ⁴²⁷ ⁴²⁸ ⁴²⁹ ⁴³⁰ ⁴³¹ ⁴³² ⁴³³ ⁴³⁴ ⁴³⁵ ⁴³⁶ ⁴³⁷ ⁴³⁸ ⁴³⁹ ⁴⁴⁰ ⁴⁴¹ ⁴⁴² ⁴⁴³ ⁴⁴⁴ ⁴⁴⁵ ⁴⁴⁶ ⁴⁴⁷ ⁴⁴⁸ ⁴⁴⁹ ⁴⁵⁰ ⁴⁵¹ ⁴⁵² ⁴⁵³ ⁴⁵⁴ ⁴⁵⁵ ⁴⁵⁶ ⁴⁵⁷ ⁴⁵⁸ ⁴⁵⁹ ⁴⁶⁰ ⁴⁶¹ ⁴⁶² ⁴⁶³ ⁴⁶⁴ ⁴⁶⁵ ⁴⁶⁶ ⁴⁶⁷ ⁴⁶⁸ ⁴⁶⁹ ⁴⁷⁰ ⁴⁷¹ ⁴⁷² ⁴⁷³ ⁴⁷⁴ ⁴⁷⁵ ⁴⁷⁶ ⁴⁷⁷ ⁴⁷⁸ ⁴⁷⁹ ⁴⁸⁰ ⁴⁸¹ ⁴⁸² ⁴⁸³ ⁴⁸⁴ ⁴⁸⁵ ⁴⁸⁶ ⁴⁸⁷ ⁴⁸⁸ ⁴⁸⁹ ⁴⁹⁰ ⁴⁹¹ ⁴⁹² ⁴⁹³ ⁴⁹⁴ ⁴⁹⁵ ⁴⁹⁶ ⁴⁹⁷ ⁴⁹⁸ ⁴⁹⁹ ⁵⁰⁰ ⁵⁰¹ ⁵⁰² ⁵⁰³ ⁵⁰⁴ ⁵⁰⁵ ⁵⁰⁶ ⁵⁰⁷ ⁵⁰⁸ ⁵⁰⁹ ⁵¹⁰ ⁵¹¹ ⁵¹² ⁵¹³ ⁵¹⁴ ⁵¹⁵ ⁵¹⁶ ⁵¹⁷ ⁵¹⁸ ⁵¹⁹ 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of Debt on Judgt. within 5 years, - if the Debt does not exceed \$5000 it may be before a Justice, if it exceeds \$5000 it must be before the Court.

So where great length of time elapsed the Court will not grant Ex. Debt on the Judgt. or a "Sine Quibus" will lie.

So where full benefit of the Judgt. cannot be obtained by taking Ex. an action of Debt will lie. As if the Debt on the original action is an absconding Debtor and the Plff. wishes to enforce. In this case the property cannot be taken on an Ex. in the hands of his agent or trustee and Debt on the Judgt. lies.

So if Judgt. was rendered in another State where satisfaction cannot be obtained, and the Debt has removed into this State Debt on the Judgt. will lie.

So where the Plff. wishes to obtain interest on his Judgt. at 6% Debt would lie. Our Ch. having of late allowed interest on liquidated demands according to the rule of Ch. J. For many our Ch. allowed no interest in such cases, a late case in Middlesex County decided in favour of the action related by Judge Reeve.

It is no objection to an action of Debt on Judgt. that the Judgt. on which the action is founded is erroneous. An erroneous Judgt. will support this action for such a Judgt. is available to all parties. *Quod hoc est illud*

2 B. & C. 211.

2 B. & C. 258.

3 Wilson 345.

8 Coke 143.

Black 175.

the

The Constitution of the U.S. Says, "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings, of every other State" The question has been made whether the validity of a judgment rendered in another State can be gone into, in this; or in other words whether when a judgment is rendered in another State, there can be any enquiry in this State as to the original Cause of action,? Some have supposed that the Constitution extends to no more and only this, "that the records of other States shall be received as full evidence that such proceedings have been had, and are "prima facie" evidence of their validity, but not conclusive proof of it,

But on this construction the Constitution
has effected nothing more than could be obtain-
ed at Law. Mr. Gould thinks that the record
of judgment in another State is conclusive proof
of the demand. It is a mere rule of evidence.

It has been decided in the S. Ct. in N. York, that Gaines 460
there may be an enquiry into the original Cause T. Dallas 188,
of action. "Contia" in Conn. So in Pennsylvania, Thibty, 126

According to the above decision they are placed
on the same footing, as foreign judgts. There are
not records according to the C. Law and are only
"prima facie" evidence of a legal demand. B. Doug. 1
was formerly held that Debt would not lie
on a foreign judgt.

It is now settled that Debit will be paid

foreign Judgt. but they are treated as simple
 286 B 410 Contracts only, the merits of the demand are
 Douglass 1 examinable, and evidence arising from such
 a record may be rebutted. The Judgt itself
 however implies a sufficient consideration
 till the contrary is shown by the Dept.

The P^l in declaring a record in an action on
 Bond 1 a foreign Judgt, need not show the original Cause
 of action. It lies on the D^f to show that the
 Wilson 550 claim would not support the Judgt.

The Judgt of a foreign Ct is examinable here
 286 B 410 only when he who claims the benefit of it applies
 2 Showen 232 to have it enforced. For it is then voluntarily sub-
 404 1473 mitted to the jurisdiction of our Ct. "Recus"
 Skinner 59 when pleaded in bar.

So Debt on such a Judgt "not introduced"
 Doug 10 is a void plea. Yet declaring on the Judgt as a
 record, does not vitiate the declaration. "Grant
 Grant, you recd as is" is sufficient.

Griffin 1745 The Courts of foreign Countries are provinci-
 611 195 ally as matters of fact in such cases. - like Recus
 286 B 410
 3 East 221.

Before the adoption of the present Constitu-
 tion the Ct in Conn. allowed Debt on Judgt
 120 removed in other States, and held that full and
 some was to be given. Yet they held that
 the original Cause of action, must appear in
 the declaration.

They treated such Judgt. therefore as recus. Recus

than foreign judgt at C. E. and showing the original Dought 1.
cause of action was not necessary in principle 1 Selwyn 556
the judgt alone is a sufficient consideration as in
the last page.

"Indebitatus Assumpsit" is convenient with Dought 4-5-6
Debt on foreign judgt - interest is allowed on such
judgt as well as on a judgt rendered here 1 East 136

It has been said (Dought 0) that when "Indeb." Dought 0
Assumpsit Debt will also lie. It is not so in all #page 212
cases e.g. Money paid by mistake - obtained by 2d ed - 1
fraud - by breach of trust - by sale of property con- 2d ed 1808
veyed by a person not the owner. 1 Selwyn 550

The rule is to be understood in general
I consider of express promises to pay money, and
of those implied from an actual contract e.g. 1 East 551
sale of goods without an express promise. Service
rendered without an express promise see page 12

On a void judgt Debt will not lie. e.g. a void ¹¹ Kins. 169
obtained by fraud no action lies. i.e. fraud in the title "fraud"
proceedings - it is a nullity. For instance if the
service is forged by the Df, the Df having never
had notice. If one person has another and con 3 Wilson 341
suffer judgt in his name. So if irregularly 2d ed 845
obtained. The question arises what is irregularity? 1st page 509
Non payment of duty in this State, Process in B. 2d Wilson 47
properly filled up in England. Process not return. 1st page 514
able on a day certain. Not returnable to
next Ct. So want of jurisdiction over the Subject
matter. (See false Impersonations)

The Court on Writ obtained by foreign Attachment. Debt. It is said does not lie against the absconding Debtor himself, the object being to draw property out of the hands of the garnishee. (9 and) But Debt on a common Writ may be brought by foreign Attachment stating that satisfaction of the writ cannot be obtained by Ex. -

For money secured by a Bond or Warrant (Bille) or recognizance the action of Debt is the only C. Law remedy. The most proper action on our one bills, given for money, is Debt. So it lies on a recognizance. Some times "sine Haec."

A Bond payable generally, i.e. no time of pay, next being fixed is payable on the day of the date. When the condition of it was that the bond be void, if the Debt did not pay. (P.B.) held non payment a breach, it was a clear mistake.

2 Don't 309
* or rather in a
recognizable time
no action can be
maintained on
that day "sine Haec"

If a bond is given conditioned for the performance of a Contractual act, there is sometimes a remedy in Ch. (which will decree a specific performance) of which "passed under the word, title" it being viewed as evidence of an agreement to do the act. But the C. Law remedy is the action of Debt for the penalty. NOTE 3rd

2 Atty 388,
2 Don't 44,
32 at 820,
2 Don't 2328,
3 Don't 132,
2 Don't 1140,

The Debt on Bond damages may be given exceeding the penalty in certain cases. E.g. if the principal and interest amount the penalty Don't 40, Burrows 232, 2 Saunders 106, 34 Bar 698, 58 Bar 303, East 436, Centur 1, 111 3, 3 Bar 484-90, 3 Bar 504.

On Covenant to pay a sum certain Debt. *Sup^d 1089*
 libel "as the title 'Covenant'" *su 1 Selw 555* *Wolfe 591*
7th Rep^s 124

If the Condition of a Bond is that the obligor
 render a fair and just account of monies received *Danf^d 307*
 nonpayment of the sum received is a breach. *25 Rep^s 388*
 Debt and receipt give rise to concurrent actions. *Wolfe 591*

If there is a Covenant with a penalty,
 the obligor has his election to sue for damages in
 Covenant broken, or in Debt for the penalty run
 up if it appears that the covenantor was to have
 his election to do the act, or pay the penalty. — *2nd Barⁿ 130*
3 Barⁿ 1345
1 Selw 555
2 Atk^s 371
Sup^d 533
2nd Barⁿ 192
 In such case on nonperformance of the act, the
 action (of Debt I suppose still) lies for the penal
 ty only. *2nd Barⁿ 418*
Note. 6th

Debt lies agt. an officer who has collected
 money for a Duty in Eq., on a refusal or neg-
 lect to pay it over; for levying it implies a Con-
 tract in Law. By the levy the profit in Debt
 is considered as transferred to the Sheriff. *2nd Barⁿ 114*
Hobart. 200
Moore 880
Chitty 220
2nd Barⁿ 550

It lies for rent reserved in a lease: it is the
 usual appropriate action (tho in some cases
 Covenant is concurrent) *pages. 123-4.* *Exp Dig^t 188*
Co Litt su 58
D^o su — 72

It does not lie agt. a tenant at sufferance for
 rent in arrears by the Common Law, tho it is a wrong.
Exp Dig^t 188
over for the Contract was determined.

But Debt will not lie for collateral articles
 levied and not sold for want of purchase, Debt
 being a sum of money due. *2nd Barⁿ 114*
Hobart. 200
Co Litt 514

But if he should retain collateral articles
 taken

taken, and estimate them in his return, at a sum
 1860b. 200. sufficient to pay the Debt he and should neglect
 "sed quere" to sell them it would seem that Debt lies agt
 him. For his own return shows that the Debt is
 Ex^a ought to be exonerated.

Salk^d 278. In Debt on gratuitous Contracts the Stat^t of
 3 Bac. 518 Limitations or a release may be given in evi-
 2 Ray 500. dence and a "nil debet" (the gen. issue.)
 Exp. Dig 202.

Alcock 400. The Stat^t in Cont^t limiting actions agt^t
 shuffts for neglect or default to two years extend
 not to actions to recover from him what he has
 received on Ex^a - this is not a neglect or default
 within the Stat^t. Thus said by Mr Gould.

Additional from Judge Reeves Title.

Note 1st. It is sometimes said that Debt is a
 a sum of money due upon an express Contract.

The Contract must be express^d, there must
 be an actual Contract between the parties; but
 the sum need not be express^d. It is sufficient
 if its certain or capable of being ascertained by
 reference to some known standard Residual^{int}.

And if the sum be certain and there is no
 Express^d Debt will not lie Ex^a. In paying a Bond
 the obligee may, 1st Debt too much, 2nd Debt will not
 lie to recover it back, there is no quid of Contract
 between the parties.

Note 2^d. You need this militate at all
 agt^t the ancient rule. For still there there is

an express contract for a sum certain the whole sum must be recovered, and these were the only cases in which Debt was lost when the old rule was established. The reason of the new rule is that the action of Debt may now be lost in cases where a "quantum valebat" or "quantum" would lie and these are the cases to which the new rule applies.

When you seek recover the sum in the declaration, you still recover a sum certain viz. the market price. See *Butt* in text.

Note 3^d. Where an "habituatus" or "perpetuus" will also lie on the contract implied to abide the award. But if a Bond is given the action must be on that.

Note 4th. If the man dies in Jail or swears out, or in any other way legally discharged an action then lies on the judge. But suppose the Debtor releases the prisoner himself; then the Law is settled that he can't sue on the judge. *I. v. 2-56-61* page 204
Don't "say Judge Recover" see the reason of the rule *1 Selwyn 049*
If he takes a Note on demand he may sue it the next day and the Note is good. It is then no crime to let the man out. But it is said that this is an escape with the consent of the creditor. It is compared to a voluntary escape from the Sheriff. But there is no resemblance between the two cases. The Creditor has always the command of the key. If he chooses to let out the creditor and take his chance of collecting the Debt he injures no one.
but

but himself. But this is not the case with the Sheriff. But it is said that letting the Credit out is Presumptive evidence of the Payment of the Debt. But it so may not this presumption be rebutted like all others. But it is said that a release can be contradicted. It is true that a man is not allowed to prove a want of Consideration for a release which he has deliberately signed and which discharges a Debt due to him. But the release under Consideration has no resemblance to this sort in nature. In the case of a release from jail there is no contract between the parties that the Debt shall be discharged. But the Law in ^{mercantile} transactions is different. There the release of a Debtor from jail is no discharge of the Debt.

15 June 1814
 Note 5th There are cases of Bonds for the performance of Covenanted acts which a different remedy than the action of Debt or a Bill in Chancery may be had. Where the bond discharges and old Debt is created a new one at the time Debt is the only action. But if the bond is to do some voluntary act to be performed afterwards, as to abide an award, in such case Debt on the bond or an action on the award will lie. So if the bond be conditioned on the bail of a house Debt will lie on an action for the breach of Contract. In these cases no new Debt is created and no old one discharged by the bond.

Note

Note Dth The penalty may be added with
with different views. This is the rule of distinction.

If the penalty is added with an intention of en-
forcing the Contract at all events there an action ^{45 Rep^e 124}
will lie for Covenant broken, But if it appears ^{Mag^d 1089}
that the Covenantor was to have his election either to ^{9 Rolle 594}
perform the agreement or forfeit the penalty ^{1 Sider 555}
for the penalty is the only action. - It is a matter
of some difficulty to decide as to particular Cases.

By the Stat of Ann in England a Ct of
Law, may now charn down ^{penal} bonds for the non pay-
ment of money, under this Stat Judgt is rendered
for the whole penalty and the Ct then charns it
down and grants Ex^t for the Debt and interest. I
believe all the States have adopted a similar Stat.
to that of Ann. But if the Bond be condi-
tioned on the performance of a Contractual act the
only remedy in England and in some of the States
is still to apply to Ct^y to charn down the pen-
alty. In Conn^t and some of the other States,
the Stat is construed to extend to a Penal Bond
and a Ct of Law may charn all bonds down. -

In an action of Debt on a Penal Stat
where the penalty is not given to any one by name ^{9 Rolle 598}
nor to a Common Infamer; the Penalty injured and
no one else shall have the action.

But if no one is particularly injured, in
such case the action is to be commenced by the
Public Infamer, and the whole penalty goes to the
Public

It is a common practice for Chy. to inflict penalties. From this practice has arisen a question on which there has been much dispute. Whether for such a penalty you may sue at Law or must go to Chy. In England it is the usual practice to resort to Chy. The question has been three times before the U.S. Ct. but they differed so much that I don't think the question settled.

I see no objection to resorting to a Ct. of Law in point of principle - the sum is certain.

See
1 S. & W. 643

If an Officer takes a Debtor on an Ex. and commits him and the prisoner escapes the Creditor may by Stat. have Debt ^{agst. Off.} or he may maintain an action on the case. Debt will lie for all escapes except they happen by the act of God.

If a bail Bond is given and the Ex. is returned, "non est inventus", and the bail is subjected the Bail may bring Debt or a "Sum. Suit" agst. the prisoner on the original Stat.

Book Debt. We have in this State a creature of our own, called "Book Debt." It was originally intended to extend so as to embrace cases of assumpsit on a "quantum meruit" and a "quantum valebat." The action is however allowed for small sums of money, but with other articles sold. The principle is that in cases where money is thus lent, in small sums no security is taken. This action differs from assumpsit in

in this. In itself, and by other proof than the man's own oath is necessary, and this among our common people is the only proof which the nature of the case many times admits. In the action of book Debt the parties and all others be their interest what it may are allowed to swear,

They must swear to the delivery of the article, and not to the value unless that was agreed on.

In Qued the value of the article must be shown by the ordinary legal proof. The Debt may be recovered if he brings in his Book, as well as the Debt.

If he does produce his Book the ballance is struck and judgment is rendered accordingly. The Debt need not produce his Book, but if he does not he cannot when he sues, recover any costs.

Debt likewise lies for the recovery of rent.

Formerly if an Estate for Life or any other freehold estate was created by lease reserving rent no action of Debt would at Common Law lie in, not while the estate continued. But if the Estate was one for

Life after the death of the Tenant Debt might be recovered. 1 Salk. 595. But during his Life an action of Debt only lay. For rent is a real Estate, and Debt is a personal action. The Stat. 32^d of Henry 8th gave the Co^{rs} of the Exchequer an action of Debt for rent. - 1 Salk. 595.

Still however the Lessee could not maintain this action. The Stat. of Anne however gave the same action to the Lessee. The Stat. of Henry 8th

8th Being before the emigration of our ancestors extends to this Country; but the Act of Anne being after the emigration is not binding here.

What remedy then can the Debtors have in this Country. The action of Debt is never lost. Why I suppose our Ob. would sustain the action of Debt. For tho' the English Statute said since the emigration, are not binding on us our Ob. sometimes where our Law is deficient follow them on the ground of their reasonableness. Debt always lay for rent, or lease for years, or any lease less than freehold.

It is a general rule that no person is entitled to the action of Debt, but him who is named in the Contract. By this is not meant that the personal representatives of the obligee, can maintain this action after the obligor's death.

The personal representative is always included in a persons own name. But if A enters the service of B as a clerk, and C becomes bound to B that A shall be faithful, for all moneys received while he continues B's clerk. B dies, and his Ex^r continues the business A remaining still a clerk. After B's death A embezzles money. No action on the bond lies agt. C for at B's death, A ceased to be his clerk, and C was still B's Ex^r no longer bound. See another Case 3 Wilson 530.

3 Equity 189 If the obligee is dead the obligee may sue either the Heir or Ex^r and thus he comes out of the real or personal Estate.

As to the action of Debt there are some rules ^{should be} *
 this. If a man is bound in a bond ^{to pay 100} * ^{single bill}
 Dollars at 5 several payments Debt will not lie ^{at sec. 112}
 till all the payments are due. The reason I
 suppose is that the 100 Dollars is considered the Debt
 and this not due till that time. But on your
 paper I see no reason why Debt should not lie ^{Co Litt 292}
 when the first payment is due, for the sum pay ^{186 R 547}
 able at that time is certain, and there is a con-
 tract. "It should lie" will lie for each of the in-
 stallments at the time they are due. And if the
 promisee be to pay 20 Dollars at one time and 20,
 at another and so on for 5 successive days Debt ^{Supra 114}
 will lie for each of the payments at the time
 they are due. Hence there is no aggregate sum. -

But suppose a Bond for 200 Dollars payable ^{page 112}
 by installments be given conditioned to have the
 penalty forfeited unless 20 Dollars be paid on such
 a day or such another day you may at C. Law Wilson 80,
 sue on the bond for the first breach and recover ^{Bond 108}
 in the whole penalty. But the Ct by that ^{page 114}
 clause drew the bond and under judgment for the ^{186 R 547}
 sum then due. How then do you get along?
 The bond must not be delivered up. No this,
 remains in Ct and when the next breach you
 may bring a "Sine Facias" and recover the next
 sum, and so on "till you are satisfied."

It is a common thing to give bonds of
 indemnity to a person who becomes surety.
 When?

When then may the surety sue the principal on this bond. This "Quærio Rexata" Al. argues that he may sue as soon as he is damaged. If he is sued and satisfies or pays the money after he is liable without being sued he is already damaged and may then sue. But is his new liability a sufficient damage? There seems here to be a difficulty. If A who has rec^d estate enough but not much money at common law becomes surety for B in a debt to C. B does not pay the debt when it is due, but is wasting all his property C would sue B for he says A has property enough and I am secured. Now if A's liability would entitle him to move he must lie by and see B wasting all his property and thus be ruined or he must sell his property and perhaps thus ruin himself to raise the money, in order to pay C and then bring his action. But if on the other hand he moves out of B, C may sue B afterwards and move again for C is not bound to go to A. The case of a Sheriff who takes a bond to secure him in case of the escape of a prisoner is a strong analogy. The reason above given is equally applicable to this case, and the Sheriff may move immediately on the escape on the ground of his liability. If the bondman and the creditor both move out of the Debtor the Debtor may I think move back the

Salk^r
3 B. 2. 200

Page. 133

Co. Litt. 5 B.

Vol. 2. 5. 37. 39

the money out of the Society in Appraisals for money had and received. But it is said that this action will not lie in favour of the Debtor. For that you ask thus attack the judgment of a Ct.

But an action will lie to recover money paid under a Judgment of a Ct. if subsequent events render it unconscionable to retain it. The judgment is not in this case overthrown it was at the time correct.

I think that the liability of the bondman is a sufficient ground for his recovery. The weight of Authority is however I believe against my opinion. Judges Chase and Wilson were in the U.S. Ct. of the same opinion with me.

In Debt on Simple Contract left them the 1868 249
same demanded may be recovered. 28th Dec 1868.
Day 19

In an action of Debt on a Simple Contract you must set out the consideration in your declaration. In Debt on a Bond no consideration need be set out. There is always one implied, That a proof of the Bond must in all cases be made. The C. & requires a proof to all specialties.

If the Bond is lost you may still recover by stating in the declaration that it was lost. 15th Dec 1868.
by time and accident and proving the loss. 35th Dec 1868.

Altho the proof may be difficult yet it is absolutely necessary for a recovery. Hence of course no proof is necessary.

At this

203 Am 773
1847 227.
page - 115

If the Plaintiff declares on a bond and sets out the condition, he must state that the condition is broken. He need not unless he pleads set out the condition but if he does he must state a breach. In a declaration on a bond you can state but one breach and if you fail in proving that your action is good the you could prove a breach of even other condition in the bond. The reason of this rule is that one breach is sufficient ground of recovery for the whole payable at C. L. At "Nisb's Principles" there have been two or three decisions questioning the rule. But the rule is well settled.

1044 209

In Debt for rent on a Lease at Will you must not only state a demise but entry by the Tenant and occupancy. For occupancy is the only ground of recovery. Neither Party is bound any longer than the Tenant a tenant But on the other hand Debt for rent on a Lease for Years will lie without stating entry and occupancy. For the Contract itself is here sufficient ground of recovery.

Co. Litt 363
1863 119

When Debt is put on a Judgment the record must be set out in the declaration and any variance between them will be fatal.

Different Pleas To Debt and Simple Contract the "per. Plea" is "sic debet" And under this plea any evidence may be given.

no show that there is nothing due. as a release in
 law may suggest be. But this action has given way
 in these cases to the action of "Assumpsit".

In Debt on a Specialty no parole evi-
 dence can be adduced to vary or contradict the
 written contract. By this it is not meant that
 parole evidence of the illegality of the contract will be *Excl. 697*
 not be admitted. But if it gives to a bond
 payable in 6 months and B sues it, and A
 cannot come in and prove a parole agreement
 that he was to have a longer time to pay it in,

And if the action is brought on a Bond and there
 is no condition on the face of it the obligor will
 not be permitted to prove that tho' he indeed *Excl. 520*
 executed the bond yet that there was a parole *Hobbs 240*
 agreement that the bond should be void on the
 happening of a certain event, which has since
 happened. This condition should appear in the
 bond and can't be proved by parole evidence.

John Stiles may give a Bond in favour
 of Stephen White. No Bond to be delivered
 to White on the happening of a certain event
 and then and not before to be his act and deed
 This is called an Escrow. But I should
 not in this case deliver the bond to White
 himself upon a parole agreement that it
 should not be his act and deed until the hap-
 pening of a future event. For White might
 sue

See the bond and this parole agreement might not be given in evidence

And here arises a disputed question "No" Can you deliver a Deed to the Grantee making at the same time a parole agreement that he shall do something instant, and that unless he does that the Instrument delivered shall not be considered your act and deed? As if A & B refer their disputes to Arbitrators, and the Arbitrators award that A shall give to B 10 acres of his home-lot and that B shall give to A his whole Farm of Blackacre. A delivers the Deed of the 10 acres into the hands of B, saying this is not to be my Deed unless you will give me a Deed of Blackacre. B takes the Deed and then refuses to give Blackacre to A

Now it is said that this Deed to B is good for that a Deed can't be delivered to that person to be benefited as an escrow. It is said that *Co. lly 835.* A must seek his remedy at Law. This was not *Co. 520* clearly the intention of the parties, I think this *Case 47* is not a delivery of the Deed as an escrow. For the event which is to render the Deed void is to happen at the time, and until the event does happen I think there is no delivery of the instrument as being the act and deed of the Grantee. If the Condition to be performed be subsequent to the delivery the deed is valid immediately. But if the Condition be precedent

or to be performed at the time it is not the deed
of the party. till the condition is performed
this includes I think all the cases on this subject

But if the condition of the obligation be
made at a subsequent time it is sufficient
if in writing and sealed. I gave a bond to Bro. Elg 523,
B for 500 £. A friend & friend B served to
the amount of £ 300, and they then agreed by
an instrument under seal that B should be
bound only £ 200, on the bond. B said intending
to move the whole but he moved only £ 200.

But the subsequent condition of contract
must appear to have been intended by the
parties to operate on the original Debt. It
must be made with express reference to it
Bro. Elg 520,
Co. Litt 65
Kent 2. 10.

When the holder of an obligation has become
truster for another, and has no interest himself
the debt will not be a discharge given by him to
the obligor after assignment. I had an obligation
of £ 500 against S. White and assigned it to T. White
S. then became a bankrupt. This obligation will
not go the assignee. But what can S. do, he
can't sue in his own name. Will he be sued in
the name of the bankrupt, yes he may, and if the
Debt pleads that S. has signed the obligation was
given to become a bankrupt the Debt may reply
over the assignment before the bankruptcy. B.
when it assigns a debt to B to perform C, and A

1st Rep^s 019
 2^d 027

A statement gives a general discharge of all claims
 Such a discharge it is generally believed will be a bar
 to a motion on the Note. But from the late Eng-
 lish decisions I think such a discharge would not
 discharge the Note.

2^d Motion 244

The Deft may by his Plea admit that
 he executed the bond but deny its validity or legality.

Now est factum

May this plea be
 used when the Deed was actually given it is
 illegal for want of form, or because the person was
 under some legal incapacity to make it? No

1st Salk^o 373

5th Co. Rep^s 119

King^o 24

2^d - 498

5th Co. 120

last Rep^s 020

2^d Rep^s 1108

This plea does not mean that the Deft is under
 no obligation to the Deft. It is proper to be used
 in three cases. 1st When the Deft did not exe-
 cute the Deed. 2^d When he did execute it by
 reason of some fraud he suffered it entirely & del-
 eved from what it was. 3^d When there has
 been an alteration of the Deed by erasure, inter-
 lineation &c. so that it is not the same instrument
 then you perceive are allegations of fact.

But if the bond is void in point of Law either from
 something intrinsic or extrinsic you must
 plead it in the avoidance by your Pleadings.

And what cannot be pleaded in avoidance
 is void. Solvit ad diem. The old Law and the
 new Law are under one and almost entire change
 by Statute. If at C. & D. you have given a single
 Bond, in 100 Dms and paid it without taking

a sealed release or without taking up the Bond you would not be allowed to prove the payment. The maxim of C. J. is that every obligation requires a discharge of the same solemnity or validity. A written unsealed release of a Bond would therefore be no proof of a discharge. Suppose then that at 25 Aug 944 he has paid the bond & refuse to give him a release at C. J. it has no remedy. He must then resort to Ch. J. In England the Stat. of Anne Bullen 174 allows the Debt to plead "Solvit ad diem" and it may be proved like any other fact. Some of the States have adopted this Stat. We have not but our Ch. J. act on the same principle as if we had. If the Bond was to be void upon the performance of a condition, performance of that condition might always be proved by parole proof.

Suppose the Debt pleads "Solvit ad diem" and proves payment six weeks before this supports his plea. But it appears from the proof that the bond was not paid till six months after due. He must see the Stat. of Anne allows every thing that is equitable and if the Debt has been paid it is sufficient. *as in fact sufficient to be proved*

How under this plea may payment be proved? It may be either by witnesses who saw the payment by writing unsealed, or it may be inferred from length of time. The usual time in ordinary circumstances from which payment would be inferred is twenty years. The length

length of time must be proved & depend on circum-
stances. I have never known a payment inferred
from lapse of time short of 10 years.

There is some dispute as to what evidence
is sufficient to rebut the presumption of payment
on a certain day. Wille says that an indorsement
within 20 yrs is sufficient. Another says it is not.
2d Aug 820. But can must be taken according to the circum-
2d Aug 1870. stances. I don't think an indorsement within 20 yrs
is of course sufficient to rebut the presumption of
payment. For the Obligor himself might make
it. But if the indorsement is bona fide I think
it sufficient. It is said that if the indorsement
page 280. be made after the 20 yrs have run it must be
proved to have been made by the Obligor or by his
order. It is said that time there are different opinions

Sometimes it is said that when the Obligor may
prove that he paid \$100 on such a day but
the Obligor may have two claims on him to
that amount. This is in such cases the rule
60 Clow 68. if the payee chooses he may show he paid
the money direct to which debt it shall be ap-
plied. But if he says nothing about it the pay-
ee may apply it to which he chooses. In Equity
2d Aug 1194. they say that if one of the demands was a debt
page 282 and the other not the presumption is
that the payment was to be applied to the one
demanding interest. - but there is no such presumption
at Law.

Accord and Satisfaction is the next defense

According to C. & L. accord and Satisfaction could never be pleaded when the Debt grew with the Debt itself as it would tend to introduce fraud by fraud proof. This does not hold where a thing is to be done or not on the happening of a future event.

See
S. Selwyn 554
D. 56970-1-14-16

These principles of the C. & L. have been rejected in many of the States. There is no difficulty when there is a bond with condition. In order to substantiate this defense there must be an agreement. As if A owes B 100 Dollars, by Note of S. Coke 517 and that B agreed to accept 1000 feet of board, and you must also prove that he did accept.

There is no case that I know of where A agreed to do a thing for B, and to deliver performance and B refused, it is not a discharge except in this case. If there is a contract to pay B a sum of money, and he agreed to accept something else in satisfaction of the debt, both the agreement and the acceptance must be proved.

And the mode of proving is that the Debt agreed to accept a certain something and that on said day he did accept. S. Selwyn 517
D. 523

The thing to be done must be of some value and of a pecuniary nature, i. e. it must be money or money worth. Other satisfactions the Law does not recognize. If a man takes another's horse and he pleads that there was an agreement -

10 days 504

agreement. Coloured him and the Diff that if he would return the Horse, the Diff would take him again &c. this would not be a good accord and Satisfaction, as there was no Consideration,

Tho' the slightest Consideration would have been sufficient as a Pint of Wine, or a glass of Grog, - which would make a contract good in point of Consideration would make this agreement good.

Suppose a man beat another and there is an agreement, that if he will ask his Word on his knees, that shall be a Satisfaction, this is no Consideration to bar an action. There must be a Satisfaction of a pecuniary value or money's worth.

Foreign Attachment The next remedy to an action of Debt is a writ of Foreign Attachment. This is a process made out by the Sub Deletors when they have gone out of the State. I came notice with some of Sub Deletors, and that will attach the money or debt in their hands. Notice of the process must however be left. Be if the third person had Goods in his hands they will then be stopped, and the Goods shall must pay the money or goods owed and if he will not you may have a "Sine Fine" judgment. Subpoena the owner of the Debt or Debt Liable. The Garnisher may plead in bar the payment or the Foreign Attachment. If he has paid

he is not bound to pay the money but he must turn them out
to the Office.

The plea to Debt on an Assumpsit
and Bond must be either "Said the D^{ft} has made or
that it was the D^{ft}'s fault that he did not save him
harmless. If he said him harmless he must show
"quo modo". May be it was the D^{ft}'s fault that he
was not saved harmless - if so it may be pleaded. --

1881
page 151

What when Debt is brot for Rent --
If the D^{ft} did not owe the Land it is a defence
may be pleaded because the D^{ft} will be obliged
to pay the rent to the Proprietor. The Lessee has
in this case no right to recover tho' there was a
contract for he had no right to make the Lease
the other 48.
Hurdson
3. Savinry

May be that you deny what you ever had a
Lease then plead "non deniit". If you have paid
it you may plead "Nil debet" and under that
issue show that you have paid and satisfied. --
Nothing in arrears" is another plea of the same nature.

Another plea is that another person has
entered and evicted you. Not that a man has
merely turned you out for he may be a mere
trespasser but I mean evicted by judgment of a Court
lawyer 242
Hobbs 320

There is a Statute of Limitation to all simple
contracts. But in these Debt is now never brot
assumpsit having superseded it. Wherever the
defence is superior you may plead it and
avoid the payment. But if you hold over after
you

page 301-2
b. 320

you become of age your piece of Infantry will
be destroyed by a explosion that you ^{had} set over
and the whole out and will be moving of you

Debt on Indigentment you can now go
back of the Indigent you can show that the Note
was paid and thus be the Indigent is conclusive

If you deny that ever was a Indigent. Read
Hobbs 216. "Real record" and the Diff if it was in the
same. It must show the record and if it was
before another. It must produce a certified
copy from the proper Office. So then Debt
is not a right an Office for escape or final pro
cess he may be "real record" and I
suppose "real debt". Any thing subsequent to
the Indigent may be pleaded.

Debt on a Bail Bond It sues B as
bail of C who is not to be found in Debt on
Stry 444 the Bail Bond B cannot traverse the arrest of
the principal. This goes out of practice
there need be no arrest of the principal

You may traverse the issuing of the writ
Sayer 140. for if that was not the writ was void.
That is the only case but it is not denied.

A plea of Set-off is not known to C
Law. It sues B as Bond and B sues A by
S. D. Now when A sues B he may plead a
Set-off. Many things cannot be Set-off. No
thing that is unliquidated or unascertained can
be

be set off. When it is liquidated it may be. This
is matter of convenience. It must be by Stat. vol 2^d 351.

But this doctrine of set off is well known in
Ch. But Ch. & C. by will never avail themselves
of a set off unless there is danger of manifest
injustice, as when one party is a bankrupt &c
It is then filed in Ch. and praying a set
off must state the other party is a bankrupt.

Plea of Release. It operates as far as
the terms of the release claim. It releases
of all demands settled at controversy. It op-
erates on all debts due at the time even tho
"debitum in presenti solvitur in futuro" - 2 Salk 578
But it does not release a contract to pay rent
at the end of the year - here there is nothing
due at the time. The contract amounts to
this if you agree quietly till the end of the
year you shall pay 100 Dols. rent. Nothing
is due till the end of the year.

A man who was bail for another set
off with the D. & got a release of "all de-
mands previous to the set off agt the Principal" - 5 Coke 70.

This was not a release there was no debt till
the set off was indeed agt the Principal. It
was on a contingency and until that contin-
gency happens there is no debt.

Bonds are sometimes joint and sometimes
several. If a joint bond is sued can the D. off
come

Of Notice and Request

by T Gould Esq.

At Law a request by the D^{ft} in actions on Contract is always necessary - but in many Cases it may be by Law only. Com Dig. Pleas C 70

The D^{ft} must always aver notice to the D^{ft} when action lies not without notice, as when it is expressly made necessary by the terms of the Contract. So when the fact or event on which the demand arises is as between the parties confined to the D^{ft}'s knowledge E.g. A promise to pay be at such a rate as any other person should pay the D^{ft} for the same. He must if to pay as much as A should pay. The first rule in this action is denied & see Thirby 188.

So of a promise to pay on the day of the promise if full age he must aver notice to the D^{ft}.

It is otherwise of a promise to pay on the promisee's marriage to a certain person as A to the promisee if he takes notice at his peril.

So on promise to deliver so much Corn if the D^{ft} approved it the D^{ft} must aver that he gave no notice to the D^{ft} that he approved it. As see 30 Rep. 153.

So on Contract to amount before Auditors when the obligee shall assign the D^{ft} must aver notice to the D^{ft}.

Second of a promise to pay on particular time of a certain act by the promisee. E.g. on Pleas C 73

Com Dig 121
D. 227
Co. Lit. 498
12 Rep. 92
Chilly 133
10 Rep. 38
3 Salk 308.

Kolach 51.
Com Dig
Condition 28
Co. Lit. 432
L 25
Folke 463.
Hare 42

see Lawes 1724
on this subject

Com Dig
Action of Con-
dition 2. 8
Salk 158.
Co. Lit. 57.
Com Dig
Pleas C 73

5 Comyns 53.
Co. Lit. 247
D. 250

Tholme 4626.50
Com Dig
Pleas C 73

Book 102 E.G. on his return to London. when he delivers such a
 D^o 228.405. House to B^{ke}

2^d B^{est} 145. "Anon" as to the first example in the above rule
 Hobart 138
 2^d B^{est} 144

So it must appear that it was given in due
 time. E.G. A promise to pay before the end of such
 Cond Digest a fair as much as the Debt is bound to be in such case
 Measⁿ C 74 the Debt should even notice given before the end be
 otherwise too late.

But if the Debt contracts to pay to a person
 D^o 453. l. 5. named of an act by a stranger, the Debt need
 2^d B^{est} 144 not even notice. The Debt must take notice at his
 Hobart 140 period. E.G. A promise to pay to when I am married.
 2^d B^{est} 315. 10
 Cond Digest

Consider E.G.
 Cond Digest So a promise to pay to when I return into
 Cond Digest the realm. So to pay if I do not pay. To pay
 Cond Digest as much as I shall direct. To pay the costs
 Measⁿ C 45 which shall be taxed in such a case. No notice
 E.G. 442 is necessary.
 D^o 884
 2^d B^{est} 144
 Book 138
 8 Book 225
 4th ed. 230

And 112. 13 So in some cases it seems the Debt is
 bound to give notice E.G. A promise by the Debt
 to deliver so much land when he shall receive the

In some cases the Debt must make and
 Measⁿ C 66 even a special request E.G. the Debt engages to do a
 Condition 211. 11
 L^{aw} 231. 1
 Law E.G. 85. 1
 3^d B^{est} 308.

So to have a Collection of Land for the Debt of a stranger
 on request. So to pay on request such sums
 Cond Digest as the Plaintiff shall request for land. Request how
 Measⁿ C 66
 Law E.G. 83. 4.
 D^o 91. 1
 as part of the consideration. reasonable
 Return

Actual request is not necessary where the duty 3 Salk 308,
 or debt is precedent or independent of the contract 10 Mod 74
 promise be, or which be tho the promise be to do 3 Salk 308,
 on request. For here the request is not of the ground 3 Leon 200
 of the action. E.g. A promises to pay on request the 2 Lev 93
 price of a Horse hired or bought by the promisee * 204

The duty would exist without the promise-request
 is not of the gist of the action. Therefore "then request"
 is sufficient * "Note." This rule must be under-
 stood of those cases in which the express contract does
 not vary the duty already existing. For the subsequent
 contract may be to do a collateral thing on request
 be "ut supra" or pay the debt of a stranger, (infra)

"Secus (ut supra)" of a promise to pay another debt on request

But this rule does not hold of a collateral prom- 3 Salk 308
 ise, or promise to do a collateral act. E.g. If the 10 Mod 74
 hiree (supra) has promised to deliver a load of 3 Leon 200
 wheat on request request must be special. So 2 Lev 93
 a promise to pay a stranger's debt on request

For in the last case the right of action is 10 Mod 74
 founded on the promise and request (there being no 3 Salk 308
 antecedent duty), - special request must be alleged, 3 Leon 200

Where there is a covenant that the Effor shall 10 Mod 74
 repair and the Effor send timber, the Effor must 3 Leon 200
 demand the timber

Where special request is necessary, time and 3 Leon 200
 place must be averred. It being necessary. "Com 231.
 Digest "Reade" C 09. "Huc" does this rule apply to 85.
 Cases,

Cases in which the Gen. Issue involves a denial of the request? as the obligation is not then traversable. Especially B.G. Indebtedness Apparent on a Bill of Exchange agt the Drawee - of which the Debt has had notice" Sufficient

Suppon a promise to pay on Condition that
bro Eliz 85. If I does not pay on request. a special request to
Con Digest I must be averred.

Heads C 69.

3d Inst. 259.

bro Sa. 183.

bro Eliz 74. 85.

1 Day. 183.

Wack. I am averment of special request.
when necessary. is not aided by writ.

On promise to pay the Debt of a stranger on request. special request must be alleged then
Salk^c 308. is no antecedent duty, and the request is part of the agreement. It is of the gist of the action. vide subseq.

Palmer 389.

3 Salk^c 308.

bro Eliz 74

When a special request is necessary the
averment is traversable. When not necessary - not
traversable. "Hence" is it traversable when the Gen.
Issue includes a denial of it as in "Indeb^t App^t?"

General Rule. When there is a contract
to do any thing "on demand" and the Debt cannot
discharge himself by a tender without request:
special request is necessary. B.G. A Merchant engages
to deliver such a sum in goods at his Store. S.S.

3 Salk^c 308 Suppose if a Merchant engages to deliver such a sum
in goods at a time fixed, he can't select the

3 Salk^c 308 Goods. Hence if to be selected by a stranger, then
Alleg 25 the Merchant should request the stranger to choose.
But.

But when he can discharge himself by Tendor 8 Luke 30
 Special demand is not generally necessary, Co Litt 208
 Co Litt 798.

"N.B. The two last rules so far as they interfere
 with the particular ones before laid down are sub-
 ordinate."

If one accepts a Bill of Exchange to be
 paid by his banker at the latter's present ^{Chitty 134}
present of the bill at the place for payment is ^{It is 1195}
 "prima facie" necessary to give the holder an ac- ^{Boyd 78}
 tion agt. the acceptor or Tendor. "Sens", if the ^{#27636 509}
 acceptor can be proved to have had no effect in ⁵¹¹
 the Banker's hands. Demand at the place is ^{Chitty 134}
 sufficient.

Finis.

250

Defence to the
Actions on Contracts by
Hon. J. G. R. R.

6th every action there is what is called the Gen^l Issue. To the action of assumpsit the Gen^l Issue is "non assumpsit". This is a denial in terms that the Def^t ever promised. But this would give a very inadequate idea of this issue. It does not mean merely that the Def^t never promised. But any evidence which shows that the Def^t's right of action is barred would support this issue. That you have performed the Contract that it was obtained by duress, - or during infancy. So may under this issue be given in evidence. It means only that the Def^t is not now liable. It is the same as the plea of "nil debet" in an action of Debt. And the rule is the same whether the promise be express or implied.

But you may plead special matter in bar as well as give it in evidence under the Gen^l Issue. But Act^s differ from the C^law. by requiring that a discharge by the act of the Def^t must be pleaded specially, and not be given in evidence under the Gen^l Issue.

Having made these observations respecting Assumpsit I proceed to those defences which apply to actions on Contracts generally.

Gend^r.

Tender. By Tender is meant an offer to pay the Debt or perform the duty you promised as if it was \$50 Dollars by Note and offer to pay. It is a tender. So if I agree to build a House for or amount \$B. an offer of services or to amount, will be a tender.

One prominent rule on this subject is that a tender where it can legally be made shall have the same effect as actually in discharging the Contract, as tho. an actual payment were made or the act performed. So where you owe money or are bound to deliver wheat at a particular time an offer to pay the money (i.e.) a tender of it or to deliver the wheat discharges the Contract.

A second rule is that if you were ready to tender at the time and the person could not be found, proving that you were there and ready to tender is equivalent to a tender.

This plea is good in all cases where the damages are certain, and in no other at (least) as where \$50 Dollars are due by Bond on a House is to be built, or wheat or wine to be delivered.

Where the House is to be built a tender of services to build it is good but not a tender of damages for breach of Contract. So you can't plead a tender to an action of Assumpsit for the damages are uncertain. But by Statute in England there are some cases where the damages are not certain

unintentional, and yet tender is a good plea. As, when a Justice makes a mistake be. And some of the States have similar Acts. We used to have a Stat^e here. "That if any person cut Grass on Land adjoining his own by mistake Tender should be a good plea. You see the ground of this Stat^e was that the injury was unintentional.

There must be no difference between the Tackler as to the Land and as to the Law. The Law must be such as an ordinary person should be. In all except Contracts then this is a good plea. So in an action on Bond for "an act or omission of good conduct according to the law." But it can never be a good plea in Tort, unless some Stat^e has made it so. nor for breach of Contract when the damages are uncertain.

When you lend Money you are not allowed to leave it if the Lender will not take it. You must take it back and always keep it for you. But any thing, articles when tendered may be left or you may take it back without being guilty of Theft. When you tender money it is an actual discharge of all security for the Debt. As when there was a Mortgage, &c. &c.

There is a practice in England and in some of the States that when a man is sued even if he has not made a Tender he may bring the money into Ct. And in those Countries where this

this practice prevails it is good in all Cases.
 If then the D^r takes out the money he has it
 and his Costs. But if he refuses to take it and
 1800 p^o 455, garnes his action, and it appears that there was
 money enough but into it the D^r will run
 in his Costs. But by bringing the money into
 1800 p^o 273 at the D^r admits himself indebted to that
 amount, and if upon the trial it appears that
 there was not so much due still the D^r is
 entitled to all the money paid in. In this state
 we have no doubt respecting the bringing
 in of money before tender.

As the man who renders the money
 is obliged to keep it. What if it be lost, without
 his negligence, and then the Tender called for it
 who must bear the loss? He should see the mon-
 ey belong after tender. Some of the elementary
 writers seem to suppose that the debt and duty
 remains tho' the deed or note is destroyed by
 the tender. But when this tender is of legal
 value as under the Debt is actually gone and
 then can be no more on the Contract. And
 I see no reason why the rule is not the same in
 case of a tender of money. It appears to me that
 the money rests in the Tenderer and that the De-
 1800 p^o 15b tender is then merely bailiff of the Tenderer. If the
 Debt is not destroyed the rule that a tender has the
 same effect as a payment is destroyed in this case.
 Besides it is the rule that the person tendering
 should

shall have the benefit of the tender. But he does not in this case, unless the property is transferred. And this appears to me reasonable, for the tenderer should have taken it and not compelled the debtor to tender to keep it. But it is said on the other hand that if the tenderer goes to the debtor and offers to take the money and the debtor refuses to deliver it he may sue on the Note for the money. This they say could not be done if the debtor destroyed the Note. But the tenderer in this case cannot because the tenderer not having been always ready to pay the money is estopped from using his plea of tender. And the money is on that ground.

When a tender has been made and the debtor then sues on the obligation, if the debtor brings the money into Court (and this he may do in this State) the debtor will recover only his Debt with the interest to the time the tender was made but without Costs. But if a demand of the money has been made after the tender then the debtor would recover his Debt and Costs. For the Law will not admit the plea of tender unless the debtor pleads that he has been always ready to pay the money since the loan, and now is so. And it is nothing more than a thing considered dead in Law should be given again. This is the case when a pleading is itself repeated.

The reason why the Law does not require the Treasurer
 ordering Cuthy articles to take them back is I sup.
 presume that it would be inconvenient for him.
 But the Treasurer can take care for the money with
 out much trouble.

But what appears to me demonstrable
 that money is transferred by Tenders is that in all
 countries where it is allowed if the creditor is in-
 capable and has left no agent to receive the money
 you must keep it and the Hold or Bond ceases to
 draw interest. So if the creditor has gone out
 of the Country (for you need not go out of the
 Country to make a Tender) and has left no agent
 And this I think proves that the money is not
 your own for if it were you certainly might use
 it. There are few English authorities on the subject.

To Bae^r 5.
 Davis's Rep^d 18
 1890 - 24
 Dyer '81.

In the first case in Davis the facts were
 that during the reign of Queen Elizabeth certain
 pieces of Copper money were made current at
 1/2 value tho' not really worth that. A owed B,
 a Debt and tendered this money B refused to take
 it and after the proclamation ceased to operate
 sued A on the Contract. A pleaded the tender, that
 he had always been and now was ready to pay it
 and it was decided that the loss by the depreciation
 in value must be sustained by B. The other
 decision in Davis was to the same effect.

This question arose in this Country about

the time and in consequence of the Revolution
 Those refugees who left the Country left Debts owe-
 ing to them. During the Revolution Continental Paper
 was made a Tender for Debts. The value of
 the refugees when their Debts became due depended
 as far as the circumstances would permit when
 the Creditors were gone. By the Peace the Debts owing
 from the individuals of the respective Countries
 were cleared. When the offer to tender them had been
 in Continental money, the question arose who
 should bear the depreciation. And it was decided
 between this Country and Great Britain that the
 loss must fall on the Creditors. This was not
 on the ground that their Debts were forfeited by
 their being enemies, for they were secured by the Peace.

When the Creditor calls on the Debtor for
 his money he must act reasonably. He must
 call on him at home, and not take an oppor-
 tunity when he is abroad. If the Debtor is not
 at home he should request the Creditor to go home
 with him and get the money. The reason why
 a suit is allowed on the Note after a tender is
 that it is in the benefit of the Debtor. For when the
 Note must be delivered up to him or the Court and
 will not be left outstanding agt him when he
 cannot prove the Debtor. And if the Debtor comes
 to the Creditor, and demands the money the Creditor
 or need not pay it till the Note is delivered up.
 If the Debtor refuses to deliver a Counterpart
 while.

article which he has kept after he has a demand
from Will. lie

A tender to a leg. a personal rep-
resentation is good

What constitutes a good tender.

3d Rep. 184 If A goes to B and says "I have come to pay you
Sir" and has the money under his arm. This is
5d Rep. 4 not sufficient in fact. He must hand it out
5d Rep. 115 to him saying "here is your money Sir" but he is
not obliged to count it. If B counters it finds
there is not enough he may return it. But if
it says "I have come to pay you your money Sir"
and B says "I will have none of your money, out
of my house" it need not offer the money.

It has been made a question in the Books
whether a tender of more than the Debt would
be good. But this is settled by the maxim
that "omne magis continet minus". But if
A tenders B too much he may recover the excess
in "Tideb. Offt" after notice.

It is said that if A contracts to do one of
two things he must tender both. But this is a
way to the intent of the Contract. For by that it
seems that A has his right to the choice or election.
But if the Contract were to do which B chose to
have him then A must tender both.

What may be Rescinded If the tender is

rescinded by Law that is the only legal one

5d Rep. 114 But if there is no Law on the subject then any
one.

current passing money is a tender. In this Country the tender is fixed by Congress. in England by proclamation.

Our Paul and the English make Coffee coin a tender. but not to any great extent. This was settled long ago in New York. There a Dealer has a great amount purchased all the Coffee he could find and hired 10 or 12 waggons to carry them one morning he called on the Creditor with two cart loads of Coffee in barrels telling he had come to pay the Debt. and that he would send 8 or 10 loads more before night. The man refused to take them, and the Ct. held it not a tender.

"Judge Reed" once had a tender of about 40 or 12 Dols in Coffee made to him by a man who for some cause was offended at him, and the Judge told the man that he was very much obliged to him as he was going to Vermont next day in a sleigh and should want change. The man insisted at his answer insisting that the Judge should count it. On no day the Judge it is no matter I presume you are an honest man, and I will trust to your honesty!!!

It is said that if a man by mistake tenders ~~Currency~~ money and the Creditor accepts the Debt is discharged and cannot be moved. The meaning of the rule is much that the Debt is discharged. But the Creditor may sue just as if he had sold any article and taken bad money for it Vol 2 - 245
I have

I have observed that where the money to be tendered is ascertained by Law that is the only legal tender. ^{Statute 554} See. But kind of Bank Notes are tendered and the ^{Statute 452} Statute makes no objection to the tender and that "Tender" is good where the tender is good. And there is one case when in "Statute" the Statute said nothing and yet the tender was held good tho' not made in money made a tender by Law. I suppose the same rule is applicable in this Country.

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If the Contract is merely to pay money and no place fixed for the payment, the tender must regularly be made to the person. In England there is an exception to this rule when the man is gone out of the country, i.e. if the contract was made with him. To what extent is this rule applicable to this Country. If the creditor is within the State there can be no doubt, but the tender must be to the person. But if he has left the State I know of no settled rule on the subject unless he has left an agent. What is material is the subject would I suppose be established as the rule. If possible he would not be compelled to go to Ohio to tender. Nor do I suppose that if the obligee moved out of the State but came near the residence of the obligor that he would be excused from tendering there in person. But if you go into another State and that contract made in no place of payment there is no doubt but you must

go there to tender however distant the place may be. But the rule respecting tender to the person does not mean that if you go to the creditor's house on the day appointed and he is absent at a distance and left no agent you must still tender to him in person. If he is not to be found you have done all that the Law requires.

You must not tender at the House where he lived at the time of the Contract generally if he has removed. In England in case no place is fixed for tender of rent tender on the Land is good.

This rule arises from their System of Tenancy. It is not to be presumed that the poor tenant is to go all over the County in search of his Lord.

If the place is fixed for the payment that it must be the place of tender. The above rules respecting tender where no place is fixed applies only to money and not to bulky articles. With respect to them the rule is that the tender must be at the place where the creditor resided at the time of the Contract made. But where it is not more inconvenient to the Debtor to tender where the creditor then lives that must be the place of tender and the Law will not consider slight differences.

And if the creditor has changed his place of residence he may alter the place of delivery if he does not, say when one which would be inconvenient to the Debtor and a tender there would be good.

Thine,

Time of Tender This is the place may be fixed by agreement of the parties. Whether the time be on or on or before such a day the rule is the same. The legal time is in the day mentioned and the uttermost convenient part of such day in both cases. And this is for the convenience of the Creditor that he may know when to expect the Tender. If the time of payment were on the 10th or within one month after, the last day of the succeeding month would be the time of tender.

If the Tender is of money it must be at such a time that it may be counted by day light. Some say it must be before sun set. And when the Tender is of a callential article the Tender must be completed by day light.

But if the time of payment be on such a day, and the Debtor goes in the morning and finds the Creditor at home or tender then will be good. So if the payment be on or before such a day, and you visit the Creditor before that day, you may then make a tender. The meaning of the rule that the Tender must be on the last convenient part of the day is that a Tender or being ready to tender at the house or place fixed before that time is not good.

It sometimes happens that when the place of payment is fixed the time is not. In such case the Debtor must give notice to the Creditor when he will pay, and if the time appointed is

Then

Restraint upon

the subject

generally, and

see also 114

see also 202

see also 206

see also 224

see also 277

see also 304

see also 314

him is a reasonable one and a tender at that time is good. 25th Decr 1793

I have had the question put to me "when is the tender to be made when the money is payable on demand and no time or place fixed." I find no rule or decision on this case. - but I think for no notice need be given before tender. 1 Salt. 623
Co. Litt. 24
9 Cro. Rep. 92.

Since it has become common to assign Bonds not negotiable by Law, it has become a question whether the tender must be made to the assignor or the assignee. If the Note be negotiable you must tender to the assignee. And Chy. would not hesitate to compel the payment to him where it was not negotiable. I think then the tender should be to the assignee for where a man has acquired rights which he can enforce at Law, or in Equity it would be hard if tender to a third person could deprive him of those rights. But I do not suppose that in such case the Debtor would be compelled to put himself to any more trouble in consequence of the assignment. But certainly *paribus* the tender must I think be to the assignee. We have decided the question in this way.

If A and B reside in E. and A gives B a Note for a Sum of Money B sells this Note to C who resides in New London. Can A tender to B? Not if he has notice of the assignment for B may be a bankrupt. We have determined that A need not go to New London C must come to E. and send an agent and if it pays it over to B Chy. will make him pay it over again. Moore 12^e.

Vendor and Refusal Suppose there is no Debt
but B a nephew living with his uncle A expecting to
be provided for in the Will B grows uneasy and
A gives him a Deed of a Farm worth 5000 Dollars
but conditional to be void if he pay him 3000 Dollars
on such a day or leaves him that sum by Will
On the day appointed A sends the money and B
refuses to take it. B is in the Law is gone and
there being no Debt he has no claim on A

The rule is that a Vendor has all the ef-
fects of a performance. If then a Vendor of money
due on a mortgage is made at the time appoint-
ed in the title of the mortgaged estate and the Mort-
gage is gone. If the mortgaged estate will not good
up the Debt Chy will compel him to do it. If
the day is past Chy will compel a reconveyance
tho the title does not revert to Vendor.

If A gives B a memorandum in writing
calling 888. that if on or before such a day he will pay him
888. 3000 Dollars he will convey such a parcel of Land
if the Vendor is made at the time B may compel
a conveyance in Chy

This rule that Vendor gives the same rights
as performance is I think carried too far in England
where 523 There if A contracts to build a House for B at
calling 755 such a time for a certain sum if he tenders his
Money 129 he may recover the whole Consideration
22388 2000 money. And this does not appear to me reasonable
2248 But the rule is not thus displayed from his
reasoning 71. But the rule is not thus displayed from his

Contract to build but that he must do when called on *2 Lardas 352*
 The doct. a different course to give another danna *20 Ray 904*
 go to the man who was disappointed and discharge
 him from his Contract

"Cornyns" says in a manuscript which
 I have seen that it is a general rule in all these Cases
 where rights are acquired by Tender that they are ab-
 soluted as those acquired by performance. And
 then he gives the example where a man Con-
 tracts to build a House.

Reading Tender The Doct. is not per-
 mitted to *2 Lardas* that he tendered according to Law
 and then stop. He must state the Facts and let
 the Ct. judge as to the legality of the Tender. He
 must state that he offered the money on such
 a day and on the uttermost convenient part of
 the day. But if he state that on such a day, *20 Ray 687*
 he met "Bills" at his house and offered him the *10 Lark 524*
 money, this is good without stating the time he *brock 423*
 have been the last convenient part of the day. *10 Lark 223*

It is said that you must state that the Tendered *brock 888*
 refused the Tender. This is the usual form and *10 Lark 458*
 it is not worth while to depart from it. If the *4 Lark 134*
 creditor was absent and you state that and he has *4 Lark 10*
 left no agent, you need not state a refusal. An *10 Lark 31*
 omission to state a refusal is matter of form. *10 Lark 581*

But when the payment was to be on such
 a day, you must state that on such a *10 Lark*
 day, you tendered or was ready to tender which day
 must.

must appear to have been the case. But if before that day you have met the D^{ty} and tendered to him state this and it will be a good plea. And here you must state that on such a day at such a place you met the D^{ty} and tendered to him. But if money is tendered and then you are sued on the Contract it is not sufficient to state that you tendered it. But you must further state that you have always been ready to pay since the tender and that the money is now ready in C^t. But if the tender is of a Call money article you need only state a tender at the time and place be -

1st Def^t 23 he gets his Cause and his Costs. And the D^{ty} 2nd Def^t 106 gets his money. There is a difference among the authorities whether the D^{ty} can take the money out of C^t. I think however he may for the D^{ty} is answerable in some way.

When the D^{ty} comes to court he may deny any part of the D^{ty} plea. He may deny that any tender was ever made or he may say that the D^{ty} has not always been ready. In the last case he states a subsequent demand and refusal and if he proves this he gets his interest and costs.

If the D^{ty} denies the tender and the C^t is found against him it is said he cannot take the money out of C^t. But the D^{ty} must in some way.

way certainly account for that sum. . . Here and in some of the other States the Ct allow the D^{ft} to take the money.

Thus when the T^{or} is of a collateral article the D^{ft} need not plead that he has been always ready to pay in England where the article is not bulky. The practice is to permit the D^{ft} to bring the article into Ct. But this by a rule of Ct. This practice prevails principally where the suit is for the restitution of some particular article. This cannot be otherwise specifically recovered at Law. In which case the D^{ft} is always in the alternative. But the Ct will give such damages as will compel a restoration of the article.

Paying money into Ct where there 2^d Bk 174
has been no T^{or} made is an assumption of the D^o - 374
D^{ft} right to recover to that amount and no more. 3^d Bk 607.
If the D^{ft} proves no more due than D^{ft} saved. 1st Bk 40
and costs accruing after that time. As to the 2^d - 474
English mode of practicing in such cases. See - 3^d Bk 135.

Our Ct have not adopted this, not because our Law on the Subject of T^{or} is different from the English. The English Law of T^{or} does not admit it after notice commenced. By our Law a T^{or} made at any time is good. But costs to that time must be taxed as well as the Debt. This is the Law in many if not all the States. This is the rule in Ct in England. And as the T^{or}

page 260.

Good at any time is good there is no need of per-
mitting the article to be broken before a Good

Those defenses which have been already treated
as of course Contracts. I shall here briefly mention,

Insanity. This is a defense to actions on
Contracts. It may be given in evidence under
"non assumpsit" and "nil debet" on simple Con-
tracts. But in other cases it must be specially
pleaded. This plea is not good in actions for
Torts for the intention is not there the ground of
the action. But if the gist of the action even
in cases of Torts is malice insanity is a good plea.
As for Slavery. In these cases there must have
been a bad motive to warrant a recovery.

Coverture. — is a defense to all actions on
Contracts. I have here only to observe that all
Contracts of married women are void except
those relating to her Real Property. There are
voidable. These Contracts which are void cannot
be confirmed by a subsequent Marriage.

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Infancy. This is another defense to actions
on Contracts. It is said while he is a minor or
afterwards it is a good defense to plead minority
when the Contract was made. But that is
some may be destroyed by the Statute in two
ways. 1st The Statute may reply that the article
furnished was necessary. On the Subject of

bound to the extent of the value of the articles in such cases but not on his express Contracts. Regularly the D^{ft} should set forth the articles. But this is not the practice. The D^{ft} may regain that the articles were not expressed.

2^d. The D^{ft} is a plea of minority may reply a new promise after full age & show that promise is valid. for his original Contract was merely voidable. And in this case the suit is on the original Contract which proves it to have been merely voidable. But the practice is to bring the action on the original promise yet I think it might be on the subsequent one.

Infancy is however no defense to actions on contracts for crimes the infant is not punishable till 7 between 7 and 14 the presumption is in his favor.

Impossibility of Performance

This is a good defense when it was impossible to perform the Contract at the time or became impossible afterwards by the act of God. or of the D^{ft} but not when it becomes impossible by the act of the D^{ft} himself.

So where the Contract is Illegal or Toll this will be a good defense. And where the consideration appears on the instrument you may remove. But if the Contract is voidable you must affirm the illegality or fraud on the record.

Dureff. This may be given in evidence under the "Gent. Issue" in "Assumpsit" and "Debt." on Simple Contract But to Debt. or Bond be you must prove it. It in this way you prove the security bad. the Debt may still remain. So if on the face of the Contract there appears a total want of Consideration, you may demur. But if the Contract is under Seal you cannot show a want of Consideration. The Sealing implies one. But if in such case the Defendant pleads to state a Consideration the Sealing does not imply one.

Statute of Limitations This Plea is good in those Cases where the Legislature have made it so. It applies both to Torts and Contracts. In different States which admit this Plea will of course be different. It is very difficult to run over all the Cases on this head with any general Principles. There is one great leading rule for which I long had a Propensity, and then which our National Ct. finally decided and ordered the grounds of their opinion to be entered on record.

This was however neglected. In some Cases it is said and admitted by all that the Stat. does not run and in others that the Case is taken out of the Stat. But the difficulty is to fix on some principle which shall settle all the Cases and not clash with those already decided.

Wm. Hall

There have been three hypotheses on this subject
admitted by Judges and Lawyers.

1st. It is said that the length of
time was presumptive evidence of payment, and
that the Statute has merely resumed that to a certainty
which was before uncertain. The Statute says they
could not go on the ground that the Debt was old,
for certainly an old debt is as good as a new one. —

Now this is plausible and if there were no cases
which opposed it I should assent. And they proceed
to say that when any thing proves the Debt not to
be paid a money may be had. As when A
the creditor proves that B promised to pay him
within the time limited by Statute or that he did
pay part and it was endorsed on the Note. Here I
admit the principle established. But it says B Gilbels & Co
you owe me so much I know that says B But Evidence 420
I will never pay you for the Statute has now agt it Vol 2 458

Here the presumption of payment is completely
rebutted by the best evidence. But still no money
can be had. Now this cannot be reconciled with
the principle contended for. analogous
"contra"

But it makes a wild assertion all his Debts
to be paid. Those claimed by the Statute will be paid
as well as the rest. But were the presumption
that they were paid they would no more be paid
over again than any other Debts. This you cannot
reconcile. "Hence" does not this rule go to show that
Ford

"Bond Debt after 30 yrs at Law are not barred and the presumption of payment, for there would be paid under the Will, &c.

3rd Nov 84 Again it became a Bankrupt and then he being again & properly advertised that he will pay his Debts. He cannot plead to a claim under this advertisement the Statute of Limitations

2nd The second hypothesis admitted no such presumption of payment. But its advocates say that a subsequent promise is good on the ground of a prior moral obligation and so likewise any act from which a promise can be inferred

This does not seem unreasonable. Were this hypothesis correct the action must be on the last promise. But this is not the case. For when the creditor was dead and the Debt barred a promise to the Ex^r of a bankrupt was a breach of the Contract with the Testator.

Selwin 1807

But there is one case which shows conclusively ~~that~~ that the action need not be brought on the last promise. A bill an action on a Note and after the action commenced D^y promised to pay it and then pleaded the Statute in bar. The action was maintained.

3rd The third hypothesis and that which I take to be the true one is the following. It was the matter of policy to compel a frequent settling of accounts. The Legislature therefore intended

it in the power of the Debtor to plead a certain length of time in bar of the claim if he chose. But if he would waive the benefit of the Stat. he may. And this principle of the Debtor having waived the benefit of the Stat. will I think apply to and resolve every question on this subject.

As where the Debt was £9 and the Debt said that he would pay him £5 for that was as much as he justly owed and the Debt was barred by the Stat. he was held liable only for £5.

So where A called on B for a Debt B wrote a letter which might mean any thing. The Ct held it a waiver of his right to plead the Stat. 25 Feb 702

So where A wanted to obtain the benefit of the bankrupt act he went to B whose Debt was barred by the Stat. and requested him to petition and B did petition and the petition was held good for A may waive his right to plead the Stat. and treat B as a creditor. But here you may perhaps see no waiver. At the end of 5 years calls on B his Debtor and B promises to pay him.

This Court properly he called a waiver, but it furnished evidence that at that time he did not mean to take advantage of the Stat. and so may be considered a waiver for 5 years. But if B had at that time been compelled to pay part of the Debt by suit, I don't know whether the Stat. could be pleaded in bar to the remainder of the Debt or not. If A wishes to be admitted

Omitting a debt due there is no need of a prom-
 iss. he waives the benefit of the Stat. But if
 he says he owes but shall take advantage of the
 Stat. this is no waiver. On this third hypothesis
 was the decision of our National Court. by the
 Judges Wilson Blair and Gann

I take the rule now to be that when
 the Debt does not plead the Stat. or when he ex-
 pressly declares he waives the benefit of it, it is no
 bar to a recovery. When I first came to the law
 the prevalent opinion in the State was that the
 Stat. barred the claim on the ground of a presu-
 med payment, and that any thing which would
 rebut that presumption might be given in evi-
 dence and would take the case out of the Stat.
 The first case I knew was an action brought on a
 Note and there was an endorsement within the
 17 years in the handwriting of the holder. This was
 held not to rebut the presumption of payment.

page 228.

In the next case there was an endorsement
 and proof of payment. This was held to take the
 case out of the Stat.

Afterwards there was a case came up and the
 Ct were of opinion that the Stat. was a complete
 bar to all claims where the time had run. Now
 the Stat. required that no suit should be lost by
 the Stat. Ct then divided again and on writ of
 Error Judgment was reversed by the Ct of Errors

Chase

Agreeably to this decision of the Ct of Errors the Sup^r Ct then divided and on writ of Error this Judgt was reversed

In this unsettled state the question came up before the U. S. Ct and "Say" and "Law" contra "Cushion" (or ~~Cushman~~) held that when the time had run the State was in all cases a bar

This question was at the same time pending before another U. S. Ct and when the cause came to trial "Cushion" and another Judge "Contra" "Law" held that cases might be taken out of the State. And in another case the Judge maintained a promise made on a Bond

Then came up the famous Case of *Pinard vs. McLean* and the Ct then held on the whole ground that the case might be taken out of the State. Money was then paid before the 17 years had run agt a State of Land.

By the Stat of James 1st Simpled Contract Securities are barred in 6 years. But the Debt remains

The acknowledgment of a Debt without saying any thing more is a waiver of the benefit of the Stat.

Where there is two joint Debtors it is held that a waiver by one is a waiver by both. For if one can be sued the other must be for they cannot be sued separately. But on the other hand it is said that if one cannot be sued the other cannot be. But the principle with res.

In the Stat of Limitations - generally 400
20 Bar 1099
Pin Ct 385
Cushion 41
5 Mad 420
Cath 471
2 Vent 152
1 Salk 29
1 Vent 191
Cushion 100
D 381
50 Bar 2030.

20 Ray 380.
D 420, 744

Cushion 548.

15 Rep 254

4 D 516

Contra
2 Vent 550

noted to think Debris is that each is to be bound
by the act of the other. Oppenoff & Tucker
to recite these cases but I don't see that he
does it.

The Stat^e begins to run on simple ^{terms} Con-
tract the time a right of recovery attaches in the
Diff. not from the time the Contract is entered into.

In all the Stat^e of Limitations there is a "pro-
viso" in favour of Infants, Femes, Convent, and persons
beyond sea. But if the Stat^e begins to run it does
not stop by the persons going to sea. So if a woman
enters into a Contract and marries the Stat^e Con-
tinues to run. So too if there are joint creditors
and all are beyond sea but one the Stat^e will run.

But there has been a question raised whether
the Stat^e runs where an "Indebitatus Assumpsit"
246 Bk 520 lies? Whenever the action is founded on a "pro-
mise of Contract" the Stat^e runs. Wherever it de-
pends on a Tort, Fraud, Breach of the Stat^e does
not run.

But what effect has the Stat^e on a run-
ning account where Indeb^t Ass^{umpsit} or one action of
account is lost? The principle is that the
Stat^e bars all that is more than 0 years old.
189

But if a payment has been made either before or
after the time has run on any part of the a/c

page 228, and no directions are given respecting the applica-
tion of the payment it will be allowed on that
part of the a/c which is barred by the Stat^e.
Limit

Limitations may be made with respect to, other actions than those on Contracts with respect to them the rule is that nothing will prevent the State from running.

If a man has been slandered secretly and thus injured and after the State has run the funds out the cause it has never been decided whether he can or not maintain an action for the damages sustained. For the ~~word~~ ^{word} then could be no action. Had the other point would be decided I don't know.

So there is a State Limitations respect ^{the} Vol 5. 418
ing the entry on lands. At C & where the right of entry is barred a writ of right lies. But then a bar to the right of entry destroys the title.

But can you tack ~~two~~ limitations? etc. when it is a minor female married. Her before Coverture she has a right to present the State from running. But her Coverture intervenes and this is another privilege. I was long of opinion that she might have the benefit of both. I knew one case where there was an adverse possession of 100 years and yet the right here not to be barred. But it has lately been settled in Massachusetts that these privileges cannot be tacked, - and this is now my opinion.

I believe that all Courts have been wrong in the form of pleading in this action. The practice has been to plead the State in bar. The proper ^{plea}

Vol 2^d 293
Vol 6th 425

Where I am convinced is a plea in abatement
for a plea a Car By our Stat. Bond it has be
en banded in 17 years in New York in Oregan,
Weld then it and B Contract by, Note in Court
and the promise goes into New York. The promise
is then sued him and he pleads the Stat in
Car at the end of 7 years. Now the Note is not
already banded in Court. On a suit then in this
State could the Supt. in New York be given in
evidence? But what law an action in one
place banded it even where. But it is said that the
Ct in New York should not have decided in that
way, for the "Lex loci" must govern. As to the
Construction of Contracts that rule is correct,
but as to the form of proceeding the Law of the
place where the Contract is attempted to be en-
forced is the rule.

It is a disputed point whether a
Stat. barring one action bars another for the
same thing. E.g. our Stat. that no action of
Trespass shall be brought unless within two years
it takes my Wagon out of my yard. Either
Trespass or Grover will lie. Can Grover be brought
after 2 years. It is said that the object of the
Stat. was not to prevent any particular form of
action but any suit after that time. But on
the other hand it is to be observed that this Stat.
is in restraint of C. Laws and such Stat. must be
strictly construed and not extended by implication.

and

and on this ground the point is settled.

Accord and Satisfaction When the Contract is to pay money and is performed full payment is the proper plea, and when the Contract is to perform a collateral act and the act is done performance is the plea. But if in either of these cases the Contract is not performed in kind but some collateral act or thing is accepted for it then Accord and Satisfaction is the proper plea.

This plea is good not only in all Contracts (with one exception), but likewise in all actions there sounding in Debt as well as those sounding in Contract. Accord is an agreement to accept something else in lieu of the thing to be done. But to bar an action there must be an acceptance of the thing in Satisfaction as well as an agreement to accept.

In all actions on Contracts both when the damages are certain and uncertain this is a good defense at Law with one exception. In case of a Single Bill for Money or Bond where the Debt be less than 110) pounds with the Debt Accord and Satisfaction is not good, 78 a good plea. Why is this exception? It is an amount of the old maxim "remunus quodcumque" Brown 130) *que ligatur dissolvitur eo ligamine quod ligatur* broke, 100

Accord is a simple Contract and provided by statute 200) and will not therefore be admitted to defeat a specialty. Payment cannot be given in evidence

pages 2267

formally to defeat a Bond or Single bill. But as this
may now in England be done by Statute the reason
why accord and Satisfaction could not be pleaded
in bar has ceased.

But the above exception extends only to Cases
where the debt grew by the Bond or bill. When the
Bond was conditioned on the "performance of a certain
natural act" "Accord and Satisfaction" always was a good
plea in bar.

When there are several Debts Accord
and Satisfaction by one is good in favour of all.
The reason is that it is a discharge of the Debt and a
discharge of the debt by one is a good bar to an action
agst the others. This plea always goes on the ground
of a Satisfaction.

With respect to Real actions accord
and Satisfaction is no bar. It cannot of course be
a bar for there is no such thing as a Conveyance
without a Deed of the Land. Here A and B have
a dispute about the title to Blackacre. A says to
B if you will give me £10 I will relinquish
my claim. B agrees to give and does give the £10
page 299. A may still bring an action and B cannot plead
accord and Satisfaction. B may recover the money
paid in an action of "Trespass Assumpsit". But he has no
title to the Land. If it were not for the Statute of
Heads and Poynter B might compel a specific
performance in Chy. That

That accord and Satisfaction may be a good Plea it must have certain qualities. 1st It must be a good Satisfaction of the Claim. 2^d It must be certain. 3^d It must be executed --

1st Full Satisfaction. By this is only meant that there must be a Consideration. And had even Sued the Consideration is it is a full Satisfaction unless the contrary appears upon the face of the Contract. But where A turned B out of door, Pleas in D and on a Suit by B pleaded an agreement between B and A that B should come back again into his own house and B did come back. This was held to be no bar for there was no Consideration. And had the Contract expressly been that A should permit B to come back should be in full Satisfaction for the Debt. it would have made no difference.

So where in Tithuff by A agt. B for taking and driving away his Cattle. B came in and pleaded that A ought to be barred because they had agreed between themselves that A should have his Cattle back and that he had taken them back. This was held no bar. But had the agreement been that A should be barred if at all right of action provided B would drive the Cattle to such a place accord and Satisfaction would have been a good Plea. -- for B's trouble in driving the Cattle would be a sufficient Consideration.

But where A sued B on a Note of hand for

for 15 Dollars and B came in and pleads that it
ought to be denied because he said that A had
agreed that it should be way of satisfaction an
cost of 5 Dollars and that he had paid the 5 Dollars
that price was paid. For it appears when the
fact of it not to have been a full consideration

1842
not analogous.

The rule laid down is that nothing is a con-
sideration but something in the nature of retri-
bution. It must be something of some value
As we see A has injured B and agrees to ask his
pardon as a satisfaction, and does it that is no
bar to an action. For it is not money now nor
ever worth. But had he agreed to give him a
glass of grog, and B had accepted it that would have
been a bar for grog is worth money!! I
think this principle is carried too far. For it is
a trouble for the Doft to ask the 5 Dollars pardon
and trouble is in other cases a consideration

2^d The second must be Certain. So,
where there was a dispute between a Landlord
and his Tenant, respecting the right of Tenancy
and they came to an agreement between them
Solved one point of which was that the Tenant
should leave the House. This agreement is said
to be void for uncertainty as no time is fixed for
his leaving it. But I don't know but it is en-
ough for that time is not fixed a rea-
sonable one will be presumed So where

So when A agreed to deliver a quantity of wheat, this was void for uncertainty: So when A agreed to employ a Sinner for 2 or three days, this is uncertain. But A says, All he dare to employ him long enough, and so he does it three days. Now it would seem reasonable that this agreement should be admitted by way of accord and Satisfaction. But the principle that what is void for uncertainty in the beginning cannot be rendered good afterwards.

3^d The agreement must be executed. So, when A owes B a Note of £ 50 payable on the 1st of January. A goes to B and says to him I don't know as I can get the money but as you are y^e looker 79th engaged in the Iron business I did not know Rolle 129 but you would be willing to take a couple of Bullion 193 Gold. So B agreed to take the Iron and bring B 305 it came to him and B then refused to take it Wms. 109.

The agreement is no bar to an action on the Note. But I think B would be liable for a breach of the Contract. As trouble is not of sufficient consideration. If then the action is lost before the agreement be executed the agreement is no bar to the action.

The mode of pleading accord and Satisfaction is much altered. It used to be that the Defendant agreed to take and did take such a thing in satisfaction and therefore he ought to be barred. But

But now it merely states that such a thing was given and accepted as a satisfaction." Both forms are good

Foreign Attachment — was unknown at C. Laad. There is little to be found in the Books concerning it. The use of it is that when A is abroad, out of the State owing B and C like wise and A B may bring his suit agt A and by leaving a Copy with C he arrests the Debt money or goods in C's hands. The Copy is an attachment on such property. If C then voluntarily pays over the money to A or over he will if B moves be compelled to pass it over again. If after a Judgt obtains agt B C pays over the money to him C may sue a suit by A agt him & plead this payment in bar. So when it does before Judgt he may plead the attachment in bar. "Quid dicit the Judge say this? &c."

The object of this Law is to give the Creditor an opportunity of collecting his Debt out of the Debtor or his absconding Debtor. After Judgt goes in favor of B how will you get the money of C? If he pays it voluntarily very well. But he says he has no property of it in his hands or that he does not owe what B says he does. B rushes out Ex^{or} and gets and makes his demand of C. If C don't pay him he gets a "Sine Quibus" agt C who must then appear and then reason why C^{or} shall not issue agt him. And

And B may now compel C to disclose the whole facts upon oath And if B does not wish him to testify still he may do it. And it is easy to prove that C was once indebted but the debt may now be discharged B's testimony however is not conclusive. The proper plea for C is that he is not Attorney & Clerk Bailiff receiver &c of it and if on this issue Judge goes agt him Ex^{on} issues for the amount of the Debt due A if B's claim is to that amount.

But this practice of Foreign Attachment opens a door for a singular kind of fraud It was an absconding Debtor of B? C owed A and expected to be served with a copy by B? C then goes to his friend D and requests him to sue A and lodge a copy with him D says why A don't owe me, no matter for that says C I expect to be sued by B and I cannot now pay the money. If you will commence a suit agt A the action can when it is served be withdrawn and I will pay the Costs - D commenced the action and when it has lain along in Ct as long as it can a writ C gets ready to pay the money it is withdrawn. B then kept from suing all this time. To remedy this evil a Stat. was enacted rendering the Plaintiff in such case liable to double Costs.

But C the garnished owed A the absconding debtor 100 Dollars worth of Shoes, &c. B then says B the Judge expected it would take the shoes and Ex^{on} in the money C may run out the shoes and

and he is then discharged. But B need not take them in discharge of his Debt. He may levy his Ex^a on them, and sell them at the Court, and it is a satisfaction "pro tanto".

If an Officer has an Ex^a agt^t the Garnisher in favour of the absconding Debtor, and the Garnisher has been served with a Copy and tells the Officer so still the Officer need not wait he may attach him, unless he pays, and in such case the Garnisher will be excused for it is not a voluntary payment. But it may be a question whether the money which comes into the Officers hands is bound for the payment of B's Debt. I think B has by leaving notice a lien on it and I think he may have a "Sine Facias" agt^t him.

If the Debt owed by C to the absconding Debtor is not yet due I think will be given for B but it will be stopped till the Debt be- comes due.

Foreign Attachment relates only to property or Debt. It does not apply to Goods. Thus if A injured B and leaves the State and C owes A B cannot sue A and attach the debt owed by C by leaving a Copy. But where C owes a Debt and serves with a Copy, and B gets a Judgment C may pay it without waiting for a "Sine Facias". And if on a "Sine Facias" I get goods agt^t him he must pay C's Debt. It is

It is a rule that the Debt of the alienating
Debtor must not be placed in a worse situation
than he was before. On this Subject there may be
some difficulty? But D. may both be Creditor of
A and both obtain Judgment. But he may first
but it may be erroneous. If he pays, he may then
be liable over to D on his own "Facts". But Stat.
provides that in such cases the rights of B and D
shall be ascertained by the "Said Facts".

Composition with Creditors This is a
good plea in Bar when the Creditors have met
and agreed to take something in discharge of
their Debts. They are bound to take what they
agreed to.

Illegality of Consideration If the
Contract be void you may demur. If it be
by Specialty you must plead specially.

Usury In pleading usury you must
state a Contract, agreement to take more than
legal interest, and that a certain Sum (as 500^l)
was received. But tho' the Law requires that a
certain Sum be mentioned yet proof of taking
a different Sum suffices, the plea.

But the plea states that there was a
Contract agreement. Must you then prove that
both parties knew of the Usury? A gives B
a Note and when he comes to pay it, it permits
B.

To compute the interest and to charge him
too much. It says it is this way. One of
the errors has decided that it is not then being
no court agreement to take more than legal
interest. I know of no other decision, and in that
the Ct was divided. I think the decision in
fact - the Stat. was meant to prevent the ra-
king of illegal interest.

Former Judgment This is good in law
when the former action was for the same thing
or cause. There may be a new trial or an appeal
but not a new action. Where then are courts
remedies a judgment on one bar the other. This is the
rule if the second action requires the same evi-
dence to support it as the former one did the for-
mer judgment is a bar. Thus where A takes B's horse
away B may have either Trespass or Trover. If
he brings Trespass he must prove that he owned
and had possession of the horse and the taking
by A. If then in this action judgment is against him
he cannot then sue in Trover for this requires
the same evidence. A judgment in Ejectment is not
a bar to another action by a person claiming
under the former title.

Discharge This differs from a release in
both 384 this, that the former is given before a right of
action, the latter after. Let us suppose a
D. - 203 certain quantity of wheat to B and the time is
7th

passed the bargain can be destroyed only by a release 2 Mod 44
 But if the time of delivery is not yet arrived and 1 D^o - 205,
 charge is sufficient. A discharge is good without 10e 2nd page 45.
 consideration and by parole. But for a release
 there must be a consideration

Payment This is good in law. The Debt
 says the Debt. ought to be barred because he says,
 he has paid the Debt. Length of time will in
 some cases lead to the presumption of payment
 otherwise it must be proved like any other fact
 When length of time is evidence of payment it
 depends on the circumstances of the case.

Performance This is the place where
 the act to be done was a collateral one. If the
 act was one on which a question of Law arises it
 must be stated in what manner it was done
 As where the agreement was not promissory & D^o. -
 What a D^o is being a question of Law, the Debt
 must describe the instrument he procured.
 But where the act to be performed involves nothing
 but a question of fact, performance, may be
 pleaded generally.

Release A release is an instrument in
 the without Seal mentioning a consideration; or 10e 291.
 with a Seal without mentioning a consideration 10e 300
 The Sealing imports a consideration. The release 10e 305,
 extends to what it specifies. A release of all or - 10e 487,
 means, or all claims, will ordinarily release all
 rights

rights of action noted and all rights of action
where the Debt is *debitum in presenti solvendum*
in futuro Debt if later Debt is not due at the time

Supra
1 Sid. 141. a release in *gratia* terms, said not affect it, altho the
1 Talk. 548 Contract out of which said Debt is to grow is already
in existence. So a release of all demands does not
release a growing contract, not then due tho it does
all arrears. Nor does a release of that kind release
a man from his Covenants. Nor will it release
an Annuity. But Covenants may be released by
express words. Where the Covenant is already broken
a release of all demands is good in law.

6. 2. 232 a release to one of several joint obligors is.
2. 2. 290 a release to all being a release of the Debt,

Old will however frequently confine the
meaning of *gratia* words in releases. But they
always in such cases, proceed on the ground of the
"imputed intention" of the parties, tho where it
held a bond against B and had assigned it over to C, (B)
had for several years paid the interest to C. And
B, having come to a settlement with C, B
a release of all demands, debt bonds &c. This
then was held not to extend to the bond on the
ground that it was not presumed to be the inten-
tion of the parties that it should thus extend. *See*
302-8 tho it might by express words of release have
been. *110.* *2. 2. 294* *2. 2. 295* *2. 2. 296* *2. 2. 297* *2. 2. 298*
least this bond it would have been a bond on C and
the C. will not presume an intended fraud. *See*

So when Howard B. 1000 Dollars B. died leaving 2d Ray 330
 A Legacy of £5. A then died and the Ex^r of B. paid D^o 604
 over the Legacy to the Ex^r of A. upon his giving a R^d. 2d Living 205.
 less of all demands. This release the Ex^r held to extend
 merely to the demands under the Will and not the
 1000 Dollars Debt.

Acts of Insolvency These acts of Insol-
 vency never affect Debts due and owing at the
 time. It never applies to cases where the Contract 7d Ray 703
 exists at the time and the Debt grows afterwards 4d D^o 94
 unless they are specially mentioned. And the reason 1 Wilson 248
 is that such Debts cannot be proved and so the
 creditor cannot come in for his share. If one
 partner obtains the act it does not bar an action
 agt. another, or the other.

By an act of Insolvency Debts and Contracts
 alone are barred, for Facts an action still lies.
 An Insolvent act in one State is no bar to
 an action for a Debt in another. We overrule
 the contrary rule. But where the Contract is
 made in the State where the act is obtained
 and to be performed there the action is barred.

But a Judgment in one State is I apprehend a
 bar in another. You cannot go back of the Judg.
 any more than if it were obtained in the same
 State. This I apprehend to be the meaning of the
 Constitution. The contrary rule which has page 207
 been partially introduced into some of the States
 is.

1838 499 is very alarming. An act of Insolvency is no bar
1838 123 to an action on a covenant not thus broken.

Award In the earliest decisions on this
Subject the Court were strongly opposed to giving them
effect. They searched with the utmost diligence
for reasons to set them aside. After this they
went over to the other extreme, and would set
foot them even when they were as in point
of Law. They now adopt a middle course be-
tween these two extremes, neither searching for
reasons to set them aside, nor overlooking manifest
defects. They now view them as any man of sense
would. This diversity of rules by which the Court have
been actuated has given rise to a diversity of
decisions.

An award is the suggestion by
persons called arbitrators appointed by the parties.
When the award is good it is always a bar
to an action on any of the grounds of dispute
submitted to the arbitrators. It is a general rule
that the action must be on the award. An
award may be a bar to any suit of a personal
nature either on fact or contract with one

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page 309.

exception in case of Contracts. The old rule
was that if the award was taken & performed in a
certain time and was performed that it was
a bar. But if the award was not performed
you might resort to the old cause of action. But
now a new duty is created by the award & the claim is discharged.

As to Real Property an award is not a bar
 This is not because disputes respecting it cannot be
 submitted to arbitrators. But the reason arises from
 the nature of Real Property. A and B having a
 dispute respecting the title to a piece of land,
 agree to submit to arbitrators. They decide that
 A has the title. Now if B will not convey to
 A, it has no more title than he before had. A page 286
 must prove his title by Deed so that in the case
 just mentioned the award will not bar an action
 by B.

But it has been practiced in England for
 each party in such case to execute a Deed and to
 give over to the arbitrators for them to dispose of
 according to their award. Well why is not that
 practiced good? It would be were it not for the
 unyielding maxim that an estate in fee can't
 be created to commence in future. And in the
 case of a Deed are delivered as a covenant to
 take effect upon the happening of a future contin-
 gency. This cannot be done. In some of the States
 this maxim is taken away by Stat. And in
 this State the maxim has no effect. I suppose
 therefore that here such Deeds would be good.

In England when the dispute is respecting
Real Property it is usual to give bonds to abide
 the award. And then if the award be such that
 A shall convey and he neglects to do it the bond is
 forfeited. So you see that all property is the sub-
 ject.

subject of award. But when the dispute is respecting Real property it is best to have a bond.

Criminal matters and Divorces are not arbitrable. They must take the course of Law. So the State and Character of a person (as whether he is a gentleman or not) is not arbitrable.

Suppose there is a controversy between A and B and upon submission the Arbitrator awards that A shall pay B £20. B may bring Debt for the money and the award is conclusive evidence of the Debt. If a bond is given and the money is not paid the bond is forfeited. But suppose they do not award money; they can afford specific relief even in cases where Ch. cannot. Ch. will in general give only when the dispute is respecting Real property unless where a Ct. of Law could grant relief. But Arbitrators may award a specific performance where the dispute is respecting Personal property. As where the dispute is between A and B respecting the right to a Cow the Arbitrator awards that the Cow belongs to A. This settles the right in A. and if B will not deliver her up. He will lie. But the Arbitrator has no power to grant Ex^{on}.

But suppose the dispute is respecting a Steam engine and the Arbitrator awards in favour of one. If the Submission be made a rule of Ct. Ch. will decree a specific performance of the award.

Set.

Suppose the Award be that it shall be paid
 10 rods of fence for so much he has carried away. As
 the Arbitrators can't grant Ex^{ra} you must bring
 an action on the Award and recover damages.
 If there is in this case a bond given, it is forfeited.

When money is awarded you may if you
 please sue on the award. But there is a ques-
 tion whether if the Arbitrators award the return
 of a collateral article and a bond is given you
 can bring Trover. If there is no bond there is
 no question but you may. The ground of ob-
 jection is that you are resorting to the original
 ground of action. But this is not so. Whatever
 the right was before the division rests the prop-
 erty and it makes no difference whether a bond
 is given or not.

Arbitrators must decide according to the
 terms of the agreement. If they are by which to
 be guided by the rules of Equity they must so
 decide. But if their decision was to be formed
 according to the rules of Law such it must be.
 But by the submission it is left generally
 they cannot decide agt. Law. Whether they have
 or not will frequently be matter of dispute.

With respect to the admission of Testimony they
 have even greater powers than a Ct of Chy. In
 Chy one party may call on the other to testify
 but cannot swear himself in as a witness.
 But

But the Arbitrator may sift the truth from the party himself.

Parties sometimes promise by Jurat to submit to the Award. If they thus promise they may be sued on it. But if they do not promise expressly they are liable on their implied promise.

But the Subscription is sometimes in writing under Seal or then you may see on the Covenant. It is now usual in England and most of the States for the parties to give bond to abide the Award.

But the most usual practice here is for the parties respectively to execute Notes and deliver them over to the Arbitrator who divides them down and delivers back according as they find by their Award.

In some of the States and in our own formerly has been a practice not known in the English Books. The parties would confess Tally to what amount they pleased and deliver them over to the Arbitrator who destroyed what Tally they did not want and then award the remainder.

On this then Ex^{ca} might immediately issue Writs what objection can there be to this practice? Why the award for some reason may not be good and then the person agtst whom it is made having no day in Ct cannot avoid it but is liable to immediate imprisonment. The

The only way in which he could get relief was by an *Amara Quenda*

The question whether the practice of Con-
fessing Sins^{ls} was lawful arose in this State
about 30 years ago and it was decided not to be

It was afterwards raised again and the Court
held the same opinion. And then decisions I
mentioned were made

The agreement is the Submission of the par-
ties either by word or in writing. This is the mere
act of the parties without any reference to Court

Sometimes the parties stipulate that if the
~~parties~~ ^{parties} can't agree they shall refer it to a third
person to decide. He is called an *Arbitrator*

But the Submission may be by a rule that
is before a Ct. And then it must be in writing
The only effect of making a Submission a rule
of Ct. is that it gives an additional remedy for
here if either party neglect to abide by the award
it is a contempt of Ct. The Ct. then issues an
attachment and if the party has no good reason
for not abiding the award they will commit
him. So if a bond be given and made a rule
of Ct. you may still sue on the bond. The rule
being only an additional remedy

In this State by Stat. the Ct. may issue
an *Ex* on the award so that there is no need of a
rule of Ct. But where the award is to perform

a collateral act, as to convey Land, or give up a claim to a stream of water no Ex.^{ta} can issue, But if a rule of Ct. be made the party may be punished for a contempt

The Stat. first enacted for making a Submission a rule of Ct. was the 1st and 10th of Geo. 3rd. Whether this might be done without a Stat. I don't know. The English Stat. had been adopted in most of the States. We authorize the Ct. to issue an Ex.^{ta} on the Award.

By the old Law when the Submission was by J^{ud} and no bond given on rule of Ct. made by Geo 7th 1790 if the award was of a sum of money, Debt would lie for it. Lord Ray 248. But if the award was the perform^{ance} 122900-58 and of a collateral act there was no remedy. 2^o - 1039 They then made this difference that the 5th Nov 35 collateral act award might be enforced when Selk^o 70 there was a Consideration for the Submission.

But the rule now is that the award is good and may be enforced whether there was a promise or not and whether or not there was a Consideration

It is not however to be understood that when a bond is given you must sue on the bond you may still sue on the Award. The Bond is not here a merger it is merely given to enforce a collateral act. So if the award be that B. shall give A a waggon, and there is a bond A may either

either I am on the bond or being Grown for the Waggon.

The Bond need not always be given to the party. It may be to Trustees as in case the party is an Infant. But a bond by the modern rule would be good tho given to an Infant. If the Submission be in writing the award may be by Juries tho we are told not. But if the Submission require the award to be in writing it must be so. The extent of a Submission, is fixed by the parties and so the time within which the award shall be made. But within that time the arbitrators may choose their own time.

The nature of this Submission is that it is revocable at any time before the award is made, as we left perhaps where one party has found out what the award is to be. Here there has been no decision but I conclude the party could not revoke. I Hypo. 10. 19 reason from analogy. For where the verdict of a Jury is found out by one of the parties he cannot withdraw his suit, tho' were the verdict not known he might withdraw at any time before the verdict was delivered in, by paying costs. The Submission is a power, and all powers are revocable.

It has been a question whether the party may revoke where the Submission is an act of Court. If he does the Ct may punish him for contempt.

We are told that where the Submission is by Juries the revocation must be, and so where Hypo. 18 the

150th 294 the Submission is in writing the revocation must be so. The reason of the rule I don't know

By the old Law where the award was to perform a collateral act, and no bond was given there was no remedy. This is not now Law

It is frequently the case that Partners be engaged into an agreement that if any dispute arise they will submit to Arbitrators. It has been a question whether such an agreement is a bar to an action. It has been decided that it is not as it would oust the Ct of their jurisdiction. But the party will be liable on his Contract.

It was the old rule that there could be no revocation where there was a bond given. But I have no doubt but there may now be tho the bond will in such case be forfeited. And there may be a forfeiture of the bond tho there be no express revocation, as if the conduct of one of the parties be such that the Arbitrators can't proceed. If one of the parties will not appear upon notice given the Arbitrators may proceed. But in some cases I should they proceed it would be useless. For the party appearing may want the testimony of the other party or the papers in his hands to make out his case. Hence a refusal to appear would be a forfeiture of the bond and were I submission under a rule of Ct it would be a Contempt.

T. Deane

Persons incapable of Submitting

It is a general rule that a person who cannot contract cannot submit to arbitration

On this ground Minors and Femes-Covered are not bound by their submissions. So of persons insane. The Law now is that if a third person gives a bond when an Infant makes a submission 18 Leth 207 since he is bound by the bond tho' the Infant is 3 Levins 27 not. It was formerly held that this bond would bind the third person. For it was said that 2 Leth 270 the Infant not being bound a bond by a third person 3 Levins 17 was not good. But this is contrary to Combs 318, all analogous cases. For a bond of Apprenticeship binds the parties tho' not the Infant. The true reason of the old rule I apprehend to have been the desire of breaking up all submissions to arbitration

So formerly it was held that a submission by Ex^{rs} was void And it now is under peculiar circumstances. But it is dangerous as the Law now is for Ex^{rs} to submit. For if it appear that they have obtained less than they would at Law they must themselves bear the loss. This is the English Law. We have a Law that if the Ex^{rs} applied to the Judge of Probate and he advised him to submit to arbitrators he shall not be liable whatever be the result. But if he submits voluntarily of his own accord our Law is like the English.

18 Leth 207

1 Dyce 2107

It is said that the Assignee under a Bankrupt.

bankrupt or insolvent act, may submit without being liable. But this does not seem to be any

Thy 23. In England they have a Stat. authorizing this in case of bankruptcy.

2 Nov 228. It has been made a question whether one partner can submit to arbitration so as to bind the other. There is no such power implied by the partnership. If he has the right it must be by express contract.

Thy 23. There has been a question raised which I apprehend owes its importance to the amount of property concerned. A whole ship's crew left a controversy between themselves and a third person to A and B two of their number to settle in any way in which they chose to. They submitted to arbitration and the question was whether the crew was bound. They contended they were not bound because A and B had not a written power of attorney. But the decision was against them. A and B were likewise bound being two of the crew.

2 Dec 260 But the general rule is that an attorney who submits is not himself bound but the principal is. He may however by the submission bind himself expressly.

If the attorney submits without authority, he is not authorized by implication but by being merely to take charge of the cause in court, he is himself bound but his principal is not.

2 Dec.

But if the Submission is by rule of Ct the Attorney is not bound while he acts within the rule.

Submission by the Husband for the Wife
If the Submission be respecting such property as he may dispose of the Wife cannot set aside the award after his death. But if he submitted respecting her annuity she may after his death set the award aside. For over the annuity itself Whole 209. he has no control. It survives necessarily to the Wife. So where the dispute is respecting Land she may set aside the award. In the last Case there is a strange opinion expressed by the Judge which is not Law "viz that if she joins in the Submission she will be bound by the award."

You find it laid down in the Books that no action will lie agt an Ex^r on an award agt his Testator. This rule was founded on the old rule 2 Vent. 249 that no action but Debt. would lie on the award 120 R. 248. and in that the Debt might wage his Land But the Ex^r could not wage his Land when sued as Ex^r.

But this whole doctrine and Law is now exploded

The exception to Contracts not arbitrable was where the Debt. is certain and grows with the instrument creating it, not depending on any future contingency. The idea seems to have been that the Debt being certain there was nothing to arbitrate about. But this is not correct.

Go

For the execution of the Bond may be disputed.
 Besides it was always admitted that if upon a
 submission to arbitration in such a case a
 bond was given to abide the award it might be
 forfeited. This shews that the submission is not
 void. But it is said the Arbitration and Award
 of Coke 43 will not extinguish the Debt. That is true,
 1 Levinz 292 and the reason of it was that there is a Stubborn
 maxim of Law which will not allow the
 Law to be proved to defeat a debt by specialty.
 1 Theobald 93. This maxim was "*quodcumque ligatur vincit*
 page 227. *vincit eo ligamine quo ligatur*" But that max-
 im is now done away by Statute. So that now I
 know of no reason why a Submitting Bond is
 void as any other kind of Contract. And always
 when the Bond was conditioned on the perform-
 ance of a collateral act, it might be submitted.

As to disputes respecting the Award to you
 I observed that tho' the award conveyed
 no title yet a bond given would be forfeited.
 This shews that the Subject is arbitrable. The
 opinions in the Books on this Subject are a com-
 plete farrago. In one of the Books it is said that
 the award is void. In another it was held to keep
 the Land. In another Case one Judge said it was
 void. In another one Judge held it void, and an-
 other that it "passed the Land if the award were by
 4 Jones 108. Deed. But in "Jones" it was held that the award
 could

could not be enforced but that the bond was forfeited. This I supposed to be the true view but they afterwards lost sight of it.

It was said in another case that a bond for years was not awardable about, and then again that it was not when agreed to be in writing. *Ex Ry 115* But a bond for years is person and property and as fit a subject for an award as any other. This was doubted till the case cited.

The only difficulty was what the award could not be enforced. But the bond would as in any other case be forfeited.

Who may be Arbitrators. It is said that then cannot be who 1st want discussion 2^d are under the controul of another. And 3^d Who are attainted of Treason or Felony.

1st Those who want discussion. The minors included under this class. There is no doubt, but those who want discussion are. When an Infant may act for another with proper authority in other cases I suppose he may as Arbitrator.

2^d Those who are under the controul of another. are always supposed to act under coercion. As the Wife (e.g.) is supposed to be under the controul of her Husband, tho' the fact is frequent, by otherwise.

3^d Those who are attainted being infamous cannot act.

One

Combs 218.
Hobbs 175
2d Am 160
Hobbs 12, 48.

One party may be Arbitrator if the other
consents to it.

Umpires These are individuals appointed
to settle the award when the Arbitrators can't
agree. They may be appointed by the parties
with many be left to the arbitrators by the sub-
mission to appoint him. But it has been
ruled that the Arbitrators shall not appoint
by chance, as by casting lots.

2d Am 485

On this subject arose a very notable dis-
pute. The submission was to A and B provid-
ed they found the award before the 1st of January
and if they did not agree then to C if he awarded
before that time. It was formerly held that
this appointment of umpire was void, because
the authority of the arbitrators extended to the 1st
of January and then there was no time for the um-
pire to act. This is not now the Law. 450 for-

Why 478 merely if the arbitrators met and could not agree
Hobbs 203, and notified C he might then award. But now
2d Am 382 the fact that C makes an award before the time
is conclusive evidence that A and B could not agree.

Hobbs 408

So too where a further time is limited to
the umpire if he make an award within the time lim-
ited to the arbitrators it is said to be valid. As when
the submission is to A and B if they award before the
1st of January and if they do not then to C if he award
before the 1st of February if C award before the 1st

2d

of Lammam it is said to be said (B) that this is now
held good on the presumed ground that the arbitra-
tors won't agree

There is another question as to what time the
arbitrators must appoint and resume when it is
left to them to appoint. It was formerly held that
they could not appoint till their time had expired
But they may now appoint at any time and
usually so that the first

There was another dispute whether when the
arbitrators had chosen one resigned and he refused to
accept they can appoint another. It was said they
could not for their authority was at an end, But
it is now settled that they may nominate until
one accepts.

Arbitrators fix the time and place of
meeting and may adjourn from time to time
within the time limited by the submission. The
parties may prolong the time, and so may the Ct if
the submission is by a rule of Ct

It has been disputed whether arbitrators may
proceed if one of the parties does not appear. But
they may

It has been made a question whether
arbitrators may divide a party and leave the rest
to an umpire. Now on this point it is remarkable
that tho' all the authorities say it cannot be done
the practice is the other way.

Arbitrators act under a joint power and
if there is an agreement in the submission that

two may decide they must all agree. And if there
 this 07. is such an agreement they must all be present
 Barnes 81.50 unless one willfully absents himself

The rule is that the award must all be
 Mayo - 77 pronounced at once

Another dispute has arisen whether when
 the arbitrators were to hear the award and deliver
 this 75.0 it is before such a time the award must be
 81.100 written. It was held that at present one was suffi-
 cient. But supposing the agreement and sub-
 mission to have been that the award should be
 ready at such a time. It was held sufficient if
 the arbitrators were ready to deliver a part award

It is said that arbitrators cannot reserve power
 to do any future act after the time when they
 were to deliver their award. This rule as it ap-
 plies to judicial acts is correct. But it was never
 considered extending their authority to provide for the
 future execution of ministerial acts. After they
 award that one of the parties shall pay a certain
 sum and upon due proof of some other he shall
 pay a certain further sum this last part will be
 110.40. For they reserve to themselves a judicial
 140 power of determining when that fact is proved
 this 78.81-140 But an award that it shall pay £10 for
 120.129 one, for all the land about which they had a
 315 dispute and that the land shall be measured
 501. This reservation of a power to measure is good
 148. being

being merely a ministerial act. So if they award that A shall pay the costs that shall after be taxed this is good. And the Arbitrators cannot claim the power of deciding any thing but what is submitted to them. If they do this last part of their award is void.

Arbitrators cannot delegate their judicial
but may their ministerial authority. They Talk. 75
must award the substance but may refer the 1890 p. 358.
manner to another.

But this delegation of ministerial authority must be unreasonable one. It must not be to one incapable of executing the trust. As if 20 Sept. 1825, they find that A pay the cost, which Gorn Stokes, pays. But who is Gorn Stokes? Why he is a Fisker! Now this delegation will not answer.

There has been a question whether an
award to stand by a former award between the
same parties is good. It is said that this is
awarding other ^{as} property. I doubt. But it is not so.
It is precisely the same as if they had awarded
the same thing without mentioning the old
award. Thus into the @

The Award must be according to the Submission. And 1st The Arbitrator can't go beyond the Submission. If one thing alone is submitted then award must be respecting that alone. If all actions are submitted then they may decide respecting all actions & pending at that time.

re. 600 221.

Sunday 1029

March 24

All right of action or all demands are submitted then they can decide all disputes. There has been a dispute whether Arbitrators can award the performance of a collateral act. This it is determined they may do. But it is said it is extending their power beyond the submission. As if it is said quite about a note they award that A shall deliver to B his bay mare. But this is no more beyond the submission than if they had awarded that A should pay B 50 Dollars. In our case the Court would have been very glad to have awarded the award had on this ground if they could. As the Arbitrators awarded that one party should each have 2000 Bucks and in fact the other to the first be.

There was never any dispute that I know of but that Arbitrators might award that one party should give a security for the payment of Money at a future day. This is as much beyond the submission as the delivery of the mare "Subia".

The Arbitrators may settle everything which it was apparently the intention of the parties to have settled. As when the dispute was respecting the payment of Gibbs. It claimed that he was discharged. The Arbitrators found not only that B should not recover the Gibbs then due but that B was exempted from the future payment of 5000. 690 him. Not only the Gibbs then due but the right was intended to be submitted. So.

So Arbitrators may dissolve a Partnership or in
ventures where all disputes are submitted. That
this was not once supposed to be Law

Costs cannot now formerly be awarded be
cause they did not exist at the time of Submission
And the same rule held as to the expenses when
the Arbitrators met at a public house

There was a Submission between A and
B of all Controversies and after the Submission
A gave B a bond. The question was whether the
Arbitrators could award that B should deliver up
to A that bond. It was said that this was not *Thyso*. 99
within the Submission. The only question in
the case is whether they can award a collateral
act. They do not award a delivery of the bond on
the ground that the bond is void

Award of a Release All disputes be
are submitted and the Arbitrators award mutu-
al releases down to the time of the award it
was once held that the award was void "in toto"

For there may have arisen a dispute since
the Submission. And if so then have exceeded their
powers. This was when Ch. wanted to destroy award +

After that they held that if such dispute cannot *Thyso* 105
be actually shown the award shall be good. 106 *Ch. 103*

They then examined what a release down to the
time of the Submission would be good tho' the
award required one down to the time of the award

After this they held that a release given down
to.

to the time of the award should be held to operate only as one down to the time of the Submission. For the award could extend no farther.

2^d The award must not extend to a stranger to the Submission. The Law on this point formerly was "that any thing to be done to or by a stranger rendered the award void *pro tanto*."

But now the rule is that if the thing to be done to a stranger is beneficial to one of the parties it may be awarded. If not beneficial it would now be void. As if the dispute was between A and B respecting a Gift, and the arbitrators should award that it was guilty and should pay C £40. this award would be void. But suppose the dispute be between A and B, in right of his Wife, respecting the title to Land and the arbitrators award that A shall convey his right to B and his Wife - this would be good.

So where C has a claim by assignment on an obligation from A to B. A disputes the execution of it. A and B left this out to arbitrators and they awarded that A executed the obligation as that he should pay it to C. This award was held good.

So where A and B give a bond to C and there is a dispute between them what proportion each is to pay. They leave it to arbitrators who decide that A shall pay $\frac{1}{2}$ and B $\frac{1}{4}$ to C this is a good award.

award. So if the award were that A & B should pay the whole it would be good.

So when the dispute was between two brothers which of them should maintain their mother, and the arbitrators decided that each should pay her so much, this was held good.

Again it is said they cannot award any thing to be done by a stranger. Well that seems very reasonable for they have no control over a third person. Suppose then they award that A should give a bond to B promising C to be his surety. This is said for you hope C won't become his surety. But suppose A has it in his power, by virtue of a contract to promise C as his surety then the award will be good.

It is a rule that the whole of a controversy submitted must be decided. Suppose then the submission to be of all controversies that A and B send, and the award only as to personal controversies.

This is good, unless you show that some other controversies were put up. The meaning of the submission is "all controversies put up." The Law is different.

If the submission be of all suits and the award is only respecting one that award is good see Collyer 858. If it is shown that more were put up. And that 860 & 98 is the rule even were there more controversies before 200. sitting at the time. You must show that more suits were put up before the arbitrators.

It was.

It was formerly considered that where the parties submitted with an "ita quod" i.e. an agreement to abide the award, provided that the arbitrators decided all disputes it made no difference whether the disputes were all brought up or not, and that the parties would not be bound unless all disputes existing were decided. But this is not now Law. But if in this case the arbitrators refuse to settle any disputes brought up, except one the award is not binding.

If there are several Specific Controversies submitted as an action for Standard, one in Black Book 210, and one of Affirmation, if there is an "ita quod" in the submission the award will be void if all are not decided. But if there is no "ita quod" they may decide what are brought up, and their award will be good, and this award will be a bar no farther than to the disputes decided.

When Specific Controversies are submitted with an "ita quod" and the arbitrators decide all those disputes and then proceed to decide the award as to the first is good but void as to the rest. But the whole award will be bad if the arbitrators make a mistake in these two significant parts of the award. The presumption always is that there was no other decided than that submitted and you may show by parol proof that all the disputes brought up were decided.

W. R. G. visited

Requisites for a good Award

1st The award must not be of an illegal act. It is sometimes said that no award will be good where an action would not lie. As if A should call B a drunken good for nothing lying scoundrel. For this no action would lie at Law. But an award of damages would when submission be good. 12. ad. 12. 2 Inst. 243.

2^d The award must be of a thing possible. By this is meant merely that the thing shall not be physically impossible. If the award is that A shall procure a Doe from C of Black and the award is bad. But if they go on to say, or pay £50 the award is good.

3^d It must be reasonable. If the award be that A shall do any thing unreasonable. As go into service to B. The Court will set aside the award. On this ground it is that the award to procure C as security, or to get such security as the other approves is void. So an award to pay money at the house of a third person is as void. And void as unreasonable. This is not new Law. Hyg 120.

4th The award must be certain. How uncertain many are set aside. As where the award is put between A and B, and then find that A owes B but do not say how much. So if they award that A shall give B a bond but do not say for how much this is void. Both Law the award

award was that it awarded £100. and that he should give B a penal bond for it. Here the Ct held this sufficiently certain. or usage has fixed the penalty in bond for money at double the sum to be paid. So when the award can be rendered certain by any plain matter of reference it is sufficient. In one case A and B had an issue as to the right to a wharf. B had erected a scaffold on it. They submitted the dispute to arbitrators who determined that the right was in A and that the scaffold should be pulled down. "Ex Holt" held this 22dly 1070 was good, for it was uncertain which was to pull down the scaffold. But I think the decision is correct. For as the right was found for A it was a trespass for B to erect the scaffold, and he should therefore have removed it.

An award to pay £20 and Costs of Suit is good for the costs can be made certain, and "is certain est. quod potest esse certum."

An award is not uncertain because it is conditional. As when the award is that A shall enjoy the use of B's house for ^{year} that if he pays annually £30 rent. But when he neglects one payment he shall cease to enjoy the award is not good for uncertainty.

It is now settled that an award may be made with a penalty if the thing is not done. 2 H. 6. 838. AS

As that A. Hall & Co. v. W. B. Black and or pay 12 Nov 580.
 £50.

Formerly the award was considered void if no time or place was fixed for performance. This is not the Law now. Thus time is fixed the award must be performed in a reasonable time. If no place is fixed and money is awarded it must be paid to the person.

If there is an apparent uncertainty you may remove it by an averment in your declaration. So if the dispute submitted be respect-
 ing north moor and South moor and the award is respecting black-acre and white-acre you may aver that black-acre and white-acre are the very places called in the submission north moor and South moor. But you cannot make an averment where there is no rule for resolving the award certain. 60 Eliz 010
 20 May 012

5th The award must be final. It must put an end to the subsisting controversy. So where the award was that the Defendant should pay for a "non-suit" this award was void for a non-suit would not prevent the action from being commenced again. 5th Nov 232

But where the award was that it should enter a "replevit" this was attempted to be compared to the last case. But such an award 142 would be good at Law for a "replevit" there would be an end to the controversy. But by our Stat.

That "Arbitrator" does not destroy the right of action

5. Nov 33. Where the award was that all Suits should
28. Aug 9014 cease the Ct held the award good for that the
2. Aug 1024 meaning was that all Suits should cease forever

So I have seen a case where the question was whether an award that the owner of an obligation should not sue, nor cause it to be sued. I have seen no decision; but I think the meaning clearly was that he should never sue or cause it to be sued.

2. Dec 110 But when money was awarded to be paid
2. Aug 1082 at a future day it was said that the award
1. Dec 59. was not final for a suit might be brought
Com. 450 for the money. So it might. But the old Cause
1. Dec 73 of action, was destroyed, and that is sufficient
5. Nov 232

8th The award must be mutual. The old idea was that an award to be mutual must prescribe something to be done by both parties. But this is, perhaps, older than the award is that Appay B. & M. for a Gift, it was held that the award must direct B. to give a release. But the release is of course the counterparty is settled without it, and there is the same mutuality. In the first case referred to this rule it was held that there need be no release awarded, but that the money must appear to have been paid for the Gift. In the

In the next case it was held that the award must be "that A pay B concerning the premises on the case submitted". It was finally held that Hobt. 49 an award to pay £10 and nothing more was of Comd. 398 fiction and the Ct will understand it to mean concerning the matter in dispute.

If any of the foregoing requisites are wanting the award is void at law —————

When an award said in part is said "in toto" and when not.

This is an interesting and difficult part of the subject. Formerly an award of a thing to be done in satisfaction of all Controversies was held to be void, because there might have arisen a controversy since the submission Palmer 108 and then the award would be beyond the Arbitration award. But such an award as I have observed before now extends no farther than the submission. The same observations apply to an award in full of all demands.

It was the old idea that an award said in part was void "in toto". This idea was found to be very mischievous. The Ct then went over to the other extreme and held that when only a part was said, the remainder should always be good. The rule now established is a mean between these extremes.

A and B have a dispute respecting the justice of a claim by A and upon submission the
Arbi.

A directs award that B shall pay that claim, and then proceed to award something else out of the Submissions. The former part of the award is good and the latter void.

So if the award be that A shall give B this bond for 100 Dols and procure C to join with him in the bond. this award is void as to the procuring C to join. But if B will accept it, his bond he must give it. But if the party who is to perform the award is willing to perform both parts the award as well as the other. Can the party in whose favour the award is object that it is void? He cannot. So in the last case if A procures C to join in the bond B must accept it.

But suppose there are several things submitted, and the arbitrators take in some beyond the Submission and award in gross. then the award is void "in toto". For the void part cannot be distinguished from that which is not. But if the award had been distinct as to each Subject of Consideration then what only wants to be void which was beyond the Submission. Hence there is no difficulty in distinguishing the void from that which is not.

But the Case is this. they find that A ought to pay B 100 Dols on the Claim submitted, and that B ought to pay on some other Claim not Submitted 100 Dols. So they make an

an offset and award that neither shall pay the other anything. In such cases where they make the offset the award is also void.

In all cases where the award is partly void for want of mutuality the whole is void, if the mutuality cannot be restored. If then formerly the award had been that A pay B 100⁰⁰ and B pay the costs this would have been void for A would receive no benefit from B paying the costs as he was not himself liable at Law to pay them.

So formerly where one was to pay 100⁰⁰ Dollars and the other gave a release down to the time of the award the release being void the whole would be. The release would now be good.

But if the mutuality is preserved the award is good tho the award be not specifically executed. As if the award be that A give B 40⁰⁰ for Lib. pass. and B release down to that time, the award is good tho B do not release. For the Lib. pass. is charged without the release. So when the thing awarded is nothing, and the party has an equivalent without it the mutuality is preserved and the award good.

Form of an Award. No particular Form is necessary unless required by the Submis- sion. The Construction is liberal.

Performance. An award is no bar to an action unless there has been a performance.

For Award
Gradly voided
Total 40⁰⁰
2. Devine 0
Geo. La. 584
D. 539
Yelverton 98
2. Seamus 203
Geo. La. 352
12. Lord 114.
Hyd. 100⁰⁰
Geo. La. 115
Mellor 587

It is substantially performed that is sufficient
 As if the award be that A shall deliver up a
 certain Will after he has deposited it with the
 Judge of Probate it is sufficient to deliver an at-
 tested copy. So if he be ordered to discontinue a
 cause and enter a "retraxit," this is a perform-
 ance. So a release to the time of the submis-
 sion when the award was that it should be
 given to extend to the time of the award, is good.

An award is sufficiently performed by any
 act which the other party has a performance
 As where the award was that A convey to B
 and at B's request he conveys to C.

If money is awarded and no time fixed for
 payment, a check or note will be presumed
 to be sufficient. If A does not pay the money, and B
 does not call on him, and after a length of time
 offers to pay B, and he refuses to take it. It was
 once the Law that if the money was not paid
 at the time, you might resort to the old cause
 of action. Now you must sue on the award.
 If A is to lease land to B, and B is to pay rent
 if A makes the lease and B does not pay, the next
 it may sue on the award. The Submission
 bond is not broken by B's neglect.

If it is to give B a bond for 100 Dollars payable
 6 months hence and neglect to pay it is said you
 may sue on the Submission bond. But you can
 you

you must either sue on the award, or on the bond given in pursuance of it

Remedy the Law gives him in whose favor the Award is - his manner of enforcing it and the Def^ts manner of avoiding it

If there be no Bond nor Covenant to abide the Award whether the Submission be by writing or fact the remedy is by an action on the Promise either express or implied to abide the Award, or if the Sum awarded be certain Debt will lie. The declaration states that there was a Submission by the Def^t of such a Controversy to Arbitrators, naming them - that the Arbitrators met, and took upon them the duty and made such an award

The declaration then proceeds to state, that the Def^t had not performed the award, and may state as many breaches, as there have actually been & if the Award requires any previous act to be done by the Def^t the declaration must aver performance of it. 18 Gen. 33
L. R. 5 640
Hys. 191

The breach assigned must be in that P^t - 203, that of the Award which is good and no breach must be assigned of a void part. As if the award was that A should give B a bond with C his indorser, the breach assigned must be that A has not given his own bond, and not that he has not given his ~~own~~ bond with C his surety. If you assign a breach only in a void part the Def^t may demur. If a breach in an illegal or void part

upset is assigned together with one in a good part.
 I ought will be asserted. For it cannot be known
 what was given for the good, and what for the
 bad assignment

Aug 9 1828

The Bond was given to abide the Award you
 may sue on the bond or on the Award

It is the most usual made in this Coun-
 try to give a bond with a typically forfeited
 by not abiding the award. The Deft usually sues
 on the typically. The Deft then prays for the
 bond, and after hearing it he states that there was
 a condition in the bond that it should be void
 unless the arbitrators met and made an Award

May 2 1842

Exp Dig 231.

Co. L. 278

Q. 220

2 Nov 77

18 Feb 1848

18 Feb 1848

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which he did not abide by, and then he prays
 to say that the Arbitrators made no award
 by this plea he means that they either made
 no award in fact or that it was an illegal one
 The Deft then replies that they did make an
 Award, and states the award itself and assigns a
 breach. It would not be for the Deft to reply
 merely that there was an award, for perhaps
 the Deft means only that there was no legal award
 and that can't be left to the Jury. After the Deft's
 replication, if the Deft means that there was no
 award in fact he rejoins "no award" But if he
 means that the award was void he can demur
 and then the Ct decide on its legality. If the
 Deft's defense is "no award within the time" after
 praying for the bond he states the condition of the bond

and then that there was no award within the time limited.

But when B having possession of the bond pleads that there was no award made and A replies that there was one and sets it out B says that he joined that he has performed it. This would be a discharge. He may let it rest upon the award performance has he shown

18 Hob. 414

The Dft when he sets out an award must not only assign a breach by the Dft but also a performance by himself of what was first required of him.

Crooke 278

2 Mod 77

There are two cases only when the Dft must state performance on his part. One is that which I have mentioned where the award requires him to perform some previous act. The other is where part of the award is void. As if it is to convey Blackacre to B on condition that B gives A a bond with C his surety. Now if B does it he must state that he gave or tendered the bond to it with C his surety and then A cannot avail himself of the fact that part of the award is void.

Crooke 844

12 Mod 114

D. 123,234

2 Mod 309

Perhaps where the action is on the award your defence is that you did not submit. Then you may plead it. But where the suit is on the bond you can't plead that you did not submit. You must appear for what the bond was given. But you may plead "non est factum" and if you did not submit it is not your deed.

If the action be on the bond and the plea

"no,

"no award" if the replication states merely that there was an award, and sets it out, and the rejoinder is "no award" the Def cannot have sought if it is found there was an award. For the award may have been performed and then the condition of the bond is not broken. The replication must state a breach.

If the award be in the affirmative the breach must be that neither has been performed.

But perhaps the Def meant to rely on his performance of the award. Then he may pray over and set out the condition of the bond, and state that he has performed the award, stating it, which the arbitrators made. The Plff has then nothing to do but deny the performance.

I do not know that there is in any State a Statute of Limitations to actions on awards.

Suppose of specific controversies one is admitted. The bond is paid. The Def prays over and then states there was no award of the promises. The Plff replies setting out the award and it appears that there were some controversies admitted which were not decided. If the submission was not with an "et cetera" the Plff may proceed to state what no other controversies submitted were brought up before the arbitrators. This the Def may deny in his rejoinder, and as the fact is so will be the decision.

But the Def may if he pleases state after

you of the bond that there was no other than such
an award made stating it, and if the Deft relies on his Oj. 838
that he may demand

Suppose the bond is sure when the Deft re-
vokes his authority: the Deft having prayed only
you may award. Then the Deft may reply that
the Deft revoked the power, and this if he proves
it will defeat the bond

It has been a question if a bond is given to
abide an award if made within such a time 35 Rep. 597,
and the parties extend the time, whether the bond
will be likewise extended. But it is settled that it
will not.

When the Submission is by a rule of Ct
you may sue on the award or apply to the Ct +
for an attachment, or you may commence Hare with the
both prosecuted. But a recovery on the attachment 106)
winners the other process. Indeed Ct will rarely
grant an attachment when an action has been
sued by or commenced on the Award.

Ct. interferes in awards only where there is
no relief at Law. If the Submission is by a rule 26 Rep. 843
of Ct of Ct. they will they will enforce & specify
in performance of a collateral Award

I don't know that Ct. ever decrees a specific
performance of an award unless the Submis-
sion be made on rule of the Ct. They do sometimes 38 Rep. 187
enforce the specific performance of awards but they 2.19
it

But it is on the ground of a subsequent agreement
 1st Chy 318. to abide the award. If the award be that A con-
 1st Wk. 74 vey to B Blackacre. I want to know Chy would
 compel him to do it. But if it has more a
 subsequent promise to do it. Chy is it then enforce it

If both parties are obliged by the award to do
 3d Wk. 20. something and one performs. Chy will enforce a
 performance by the other.

Where an award was made that A should
 convey Blackacre, and B should pay him £900.
 2d Wk. 24 the award was void and the parties knew it.
 B went to A and asked him if he intended to set
 3d Wk. 187 aside the award. A said no. fetch me the £900
 and I will convey. But the money and A re-
 fused to convey. Chy enforced the conveyance
 But it was not clearly on the ground of the award
 that being void.

They always enforce awards on the ground
 of an agreement either express or implied. And
 Ch of Equity have decided that when the parties
 1st Wk. 40 have acquiesced for a long time in an award
 they will grant an injunction if they attempt to
 set it aside.

If there are extensive defects in an
 award made under a submission out of it the
 award can be set aside only in Chy. But if the
 2d Wk. 315 Submission is by a rule of Ct a Ct of Law will set
 2d Wk. 149 it aside. If the arbitrators are corrupted & thus
 the

there is a rule of Ct where the party is summoned
 in to show why an attachment should not issue 3d W. 529
 agt him he may prove the reputation of the de-
 bitors. If at the submission been out of Ct
 he must have resorted to Chy. Now for this rule
 prevails in the States I don't know. We allow
 these extrinsic causes to be used in Ct of Law
 even when the submission is out of Ct

Cases where Chy relieved.

Two of the debtors it seems were prejudiced
 agt one of the parties. and so continued their meet- 2 term 515
 ings as to make it impossible for the other to
 attend.

So when it was known that after the ap-
 pointment of Arbitrators some of them had se- 2 term 485
 cret meetings with one of the parties. And in
 another case where they chose and umpire by lots

So again where the Arbitrators could not
 agree as to the amount of the award one pla-
 cing it at 30. and the other at 295. They chose an
 umpire and his servant man before the master 2 term 101.
 had heard the cause (being a wonderful quessid)
 said his Master would award 205 and he did
 award precisely that sum

So where some evidence was introduced by
 one of the parties and the other said he was sa-
 tisfied with it and requested the award might not 2 term 251.
 be made till he was heard further on the sub-
 ject

Subject. The Arbitrators promised they would do
for their decision but still went on to decide

So when the Parties had long had accounts
which were from time to time settled and re-
ferred the Settlement of all accounts to a single
Arbitrator. One of the Parties insisted that he
30. Wm 362 should not go back of the last Settlement unless
there was some mistake which the opposite
Party could lay his finger on. The Arbitrator
with that understanding went back to the Commencement
of their Accounts.

So when one of the Arbitrators before he
28. Wm 310 had heard the Cause said "he would make it
costs"

So when the Arbitrators met one ap-
peared to lead strongly agt. one of the Parties
28. Wm 310 and another observed that he had nothing to
do with the Parties but only with the Cause
The other replied he would "mould it" and that
he did not care about the Cause

So when the Arbitrators charged 6 guinees
a piece and would not award until they had
28. Wm 310 reviewed themselves they directed each Party to pay
2000 - 403. 3 guinees in advance & adjuting the award to be
agt. him refused. The other paid the whole.
The O. held it dangerous to allow them to receive
money from one of the Parties before the award
was delivered

So agreed they set aside an award where
the

there was no reason to suspect dishonesty. The Abolitionists were Merchants of the first respectability. But they had an interest in having the award given 28th 15% in favour of one of the parties who was their debtor and wanted them to be able to pay them. The Objection that it would be dangerous to support awards in such cases.

One of the parties may so conduct that Ch. will set aside the award. As when the Abolitionists called for the papers, and he kept back an important one which in the opinion of the Abolitionists would have altered the award 18th 97

Question as to the legality of awards cannot be discussed in Ch. If they are illegal because 24th maintained or for any other cause, they may be set aside at Law

If the Abolitionists mistake in point of Law or fact, and this is apparent on the face of the award Equity will set it aside. But they will not examine into the cause to discover the illegality or mistake. As in the case of "Watkinson and Waterhouse". They formerly constituted the old Law of "Watkinson" - they both then made but one party. Some Property was left the Society for the support of the ministry. If the party was divided into two or more the property was to be distributed equally among them. When Watkinson was set

J.H.

off the dispute was left to arbitrators who divided
 the property between them according to the amount
 3th 497 of their lists. This being a mistaken appearance on
 the award (for they could not alter the Will) Equity
 is relieved. Equity and Law you therefore perceive
 give complete relief whether the error in the award
 be extrinsic or intrinsic. By the old Law the
 Jst must have been a performer and on this
 point. But he need not now except in the two
 cases which I have before mentioned.

When is one case where persons not joined
 to the award may plead it in bar to an action.
 When two or more persons have jointly injured
 another a satisfaction by one is a satisfaction for
 208 another. So a judgment against one is a good bar to an ac-
 tion 328. So a judgment against one is a good bar to an ac-
 tion against the others. The same rule applies to an
 award obtained against one of them. This may be
 pleaded in bar to an action against another.

It is said that when there is a submission by
 the parties and before the time of making the award
 one of them commences a suit, this submission may
 be pleaded as a temporary bar. I think in this
 case there would be an implied revocation and a
 forfeiture of the Bond if one was given.

As to the old idea that if the award is not performed
 265 at the time fixed you may resort to the old cause of
 action. I don't think it can. Finis.

342

350

Private Wrongs

मन्त्रः ॥

ॐ नमो भगवते वासुदेवाय ॥

Private Wrongs

By James Gault Esq.

Slander

Slander consists in maliciously defaming a person 4 Bac 488.

II By words written or spoken which tend to injure him in point of personal Security, Con- 4 Bock 14
reputation Office Profession or interest. Baillie 9
3d Bock 123
C. 490

III Without words, as by Signs Pictures &c. of the above tendency. C. 490
3d Bock 123

Committed according to the usual division in three ways. 1st By Words, 2^d By Writing, 3^d By Signs, Pictures &c. 5 Bock 125

Oral Slander or Slander by words is of two kinds. 1st Of words in themselves actionable 4 Bac 483
2^d Of words not actionable in themselves but be- 2d 494

coming so by means of some special damage accruing to the person of whom spoken in consequence of them (In judg^t of Law words action-

able in themselves are abstractedly injurious there- fore the Pl^t in his Declaration need state no special damage to himself in consequence of them.

But when the words are not in themselves action- able but become so from some Supervenient

Fact the words which in that state are included within track- ed are not from the facts told, but from some other facts } Cause

Caused they are not abstractly considered in jds¹² of
Law. injurious they are held in consequence of them
Some special damage has ensued to the person or
nation spoken. he is entitled to no action and then
he must show the special damage and prove it

4600 14 (at trial) The general ^{rules} relating to real estate
can apply to written. But

II Of Oral Manner

According to the definition of liberty and malice
must concern to constitute Glauber Malice what?

4 Bar 483 It is a Gen Rule that for words in them
 & ¹⁰⁰ Sects actionable the Diff. must be more or more
 1400¹¹¹ by proving the word for damage is implied. (But
 is a Gen Rule) but there are some exceptions - and
 such words 'prima facie' are not malice,

But the presumption of fraud may be re-
butted by proving that they were spoken under
circumstances which exclude the inference of fraud.

Classes of Actionable Words they are four

And Law 185 1st Part which bring the person of a Slave of a Slave
38 Slave 182, into range of legal punishment.

4.83d " 4.83 2nd Photo tending to exclude him from Society

493 3rd Those injuring me in his trade or profession,

4th There tending no signed one in his office

II Binding into stages of furnishment.

40 Dec. 483
 1000 038.
 20 032.009

clearly actionable. e.g. charging a man with
 Treason. Felony. Perjury. Forger. &c. &c. 4 Coke 20, Brod 114, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

According to this classification words may be
 actionable per se tho' they do not injure ones repu-
 tation, and then may injure ones reputation, and
 yet not be actionable.

Words charging what would subject to trans-
 portation are actionable. So, charging

Words charging what would subject to imprisonment
 or imprisonment and actionable, imprisonment being con-
sidered punishment. 2 Vent 260, 4 Bac 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

In the case in Salkeld, the charge of biga-
 my a bastard was decided not to be scandalous,
 tho' tho' Stat 18th Elizabeth mentioned in Salk,
 subject to imprisonment if the bastard is
 chargeable to the parish. (The decision how-
 ever is consistent with the rule for the charge
 was not that the child had become a charge to
 the parish, nor was it so stated in the Stat
Declaration consequently it was held ad. Dominum.)

Words charging what would subject to a fine
 are actionable or not as the fact charged is in
 law or not. So decided in the Supr. Ct in
Corn, "Quod est in rebus aut factum in England?"
 It seems so tho' it is not clear.)

Edwards has now laid down the rule

Exp. 497 on this broad basis - "that to charge one with any
 crime which makes the person of whom it is
 charged to prosecution is actionable" Queen (This
 proposition is certainly correct and contrary
 to the judicial decisions) - for otherwise a charge
 of mere trespass would amount to slander
 which is unquestionably not the case.

Exp. 573 Words charging what would subject to
 punishment must be actionable. Charge
 a criminal fact committed. Charging with
 evil intentions is not sufficient, e.g. he gave
 me cause to kill me. (He is not actionable)
 To suspect to see him indicted for stealing a
 horse is not sufficient. Queen. To word of
 a similar import, spoken sufficient after
 Exp. 497. Words.

Adjective words under that head are action-
 able or not as they presuppose an act com-
 mitted or not. E.g. To call one seditious, trea-
 sonable, traitorous, &c. is not sufficient not
 slanderous, for these adjectives only suppose a
 seditious, traitorous, &c. intent, and not
 an act actually committed. But to call one
 a traitor is sufficient for the adjective presupposes
 the crime committed.

4. 32. 484 To say "a traitor" is not actionable unless

It be added "in a judicial proceeding" over such a case
 So to call one a thief after a general pardon
 is actionable. Pardon clears from guilt
 (After pardon he is not in jeopardy of law a thief he
 he is thereby made a new man) So if t.h. had
 killed the thief he had been pardoned

4 Coke 15
 Cowley 609
 3 Leach 180
 Esp. 497
 Hob. 81
 4 Bac 487
 40 -- 52
 3 Bac 510
 40 Reg. 23

So charges one with having committed a
 crime of which he has been acquitted is actionable per
 Here is no danger of punishment (But such cases 150,
 cases must stand on some other principle than
 their tendency to subject the person charged to
 legal punishment for as the acquitted are dan-
 ger of punishment cases.)

If the word charge a crime which is
 a crime could not have been committed they
 are not actionable. e.g. he has killed "J.G." "J.S." "Buck" &c
 being still alive

But this matter may be proved in fact But I
 can it cannot be given in evidence except in mitigation
 mitigation of damages. (The P.P. should state
 him to be alive in his declaration it might
 be deemed to)

So to the word charging a crime a descrip-
 tion not corresponding with the crime charged
 he added the words are not actionable e.g. calling
 one a thief because he had committed a certain
 act which amounts only to a indict. co.

4 Bac 510-85
 40 27-8
 40 104
 40 51
 40 674
 40 13, 14, 16
 40 13
 40 511-7
 20 Reg. 235

But charging a crime to the prosecution
for it is bound by the strict limitations of the
sense of the word spoken is actionable. This
was ruled by *Supr. Ct. 1793. Webb vs. Fitch*.

Webb 487 It would in themselves be actionable. Admitting
an innocent meaning it lies on the Deft to
show that word used in that sense

Webb 317 The furnishing of the crime charged
Webb 315 is in the alternative the word is actionable
Webb 480 if the furnishing may be inferred to be
Webb 594 charging one with being the father of another
Webb 487 a husband which husband charged he is liable
Webb 57 for the father is imputable to imputation
Webb 498 must be charged the name of husband

3d Nov 123

Webb 144

Webb 44

Webb 219

Webb 205

Webb 17

Webb 488

Webb 488

Webb 214

Webb 430

Webb 248

Webb 488

Webb 144

Webb 490

Webb 182

Webb 498

Webb 123

Webb 180

Webb 150

Webb 182

II Tending to exclude from society. to
charge a man with having a contagious
case.

But the word to be actionable must be
that must charge a present disease. *Webb 1189, 288, 493*
The, however if it were of a past one it was then
dead.

Under this head adjective words in the
present tense are actionable

III Tending to injure one in his Reputation
or Trade. of calling a Lawyer a Knave is action-
able. *Webb 521, 55, 53, 6, 5, 15, 52, 54, 182, 28, 493*

So he has revealed his client's secret

So - "he is no Lawyer" - no more a Lawyer than the Devil - &c

So in general charging a Lawyer with ignorance in his profession. See Cl. 382 & 278. Dec. 25.

In these cases however the Lawyer must state in his Declaration that at the time of the words spoken he was a practicing Lawyer.

Proof of the Pfrs acting as a Lawyer was held sufficient.

So, falsely calling a Trader a Bankrupt is actionable. So - "he is a bankrupt" known. So - he will be a Bankrupt in two days. See Cl. 330

To charge him with cheating his creditors and advising them not to deal with him is actionable.

In actions by Tradesmen in these cases it must appear by laying a Colloquium or other words that the words were published with respect to his Trade. E.g. he is a Cheat - here a Colloquium concerning his Trade is necessary to be laid. But if the words were "he is a Bankrupt" it would be sufficient (I suppose) merely to aver that he was a Trader &c.

To not deal with him - he is a Cheat &c &c is good without a Colloquium. (It is not necessary to lay a Colloquium when from the words themselves it is inferred they were spoken of the Trade &c or that they were spoken of his Trade.)

To call,

1 Roll	54
3 Writs	59
1 S. D.	32
1 Roll	54
4 Bae	491-2
1 Com.	182
Stiles	231
4 Bae	491
2 S. D.	28
Polhem	207
4 S. D.	366
4 S. D.	380
2 S. D.	48
4 Bae	491
2 S. D.	366
2 S. D.	499
1 Com.	183
4 Bae	493
Polhem	299
Stiles	81
4 Bae	493
2 S. D.	366
2 S. D.	1400
1 Com.	183
1 Com.	1088
4 Bae	492
Stiles	894
Polhem	670
2 S. D.	1109
2 S. D.	398
2 S. D.	159
2 S. D.	1417
1 S. D.	115
2 S. D.	250
4 Bae	492
2 S. D.	62

2 S. D. 62

Backus
Bishop

To call a Clergyman a Liard has been decided to be actionable in the Sup Ct in Conn and that decision was affirmed by the Ct of Errors.

3 Revue 17

16 Com 181

12 Revue 36.58

22 Bacon 490

6 Com 253

11 Revue 440

18 Revue 54

16 Com 182

6 Com 520

48 Revue 491

11 Med 221

To call a Clergyman with "punching Liard" is actionable.

To call him a "Drunkard" is actionable. To other points as calling him a "Rogue" &c see margin.

To call a Physician a "Quack" is actionable. To say "he has killed a patient" is said not to be actionable unless it be said "knowingly" or "willfully" or the like. Justin Clinch was referred to the Bench. And the soundness of the decision may be questioned as it disposes ignominy in his profession. True it is not warranted by the decision in Modar, De Modar, Super where the same words said of an Apothecary were adjudged actionable. Still as to Quack & Drunkard.

48 Revue 491

21 Revue 898

With regard to Mechanics it may be laid down as a gen rule that any words tending to injure a Mechanic in his trade are actionable.

48 Revue 488

Revue 500

22 Revue 1290

16 Com 180

16 Com 595

18 Revue 65

48 Revue 489

D 488 1073

16 Com 695

IV Sending to inquire one in his Office words charging one in an office of profit with want of ability or integrity are actionable.

But words charging a person in an office of trust or honor with want of ability are not actionable. But a charge which

impeaches his integrity is actionable. Whether it be made agt a man holding an Office of Trust and Honor, or agt one holding an Office of Profit.

Talk 895
Syst 817
2 Es Ry 1309^a
460k 10
Harb. 140.

(The reason given why a charge of want of sufficient ability, when made agt a man holding an Office merely of Trust and Honor, is not actionable is because a man cannot help his want of official, sufficient ability. But does not this reason apply equally well to such a charge made agt one holding an Office of Profit?

It surely does. And Judge Reeves and Mr. Gould think that as the gist of the action in all the cases of malicious charge made agt men in Office is the tendency they had to injure, and as a charge of a want of ability has as great a tendency to injure as a charge of want of integrity, therefore it ought to be equally actionable. Consequently then the distinction is an unsound one on principle. (N.M.)

The distinction is clear in the Books however and therefore calling a Justice of the Peace "a little heated Justice" is not actionable. (The Office of a Justice of the Peace is considered as one of mere trust and honor.) Charging a person in Office in either case with inclinations and principles which disqualify are sufficient without charging any act. Talk 895

Colloquium When the word spoken is not of themselves in fact so have been spoken with reference to the Office. Character, a Colloquium. Es Ry 1309
Syst 818
Bacon 489
pe 88
D 488, ii. 54

1. Eving 280, is necessary. (Thus if one speaking of J. F. in his official capacity of Justice of the Peace says he is a Knave meaning that he is a Knave in his capacity of Justice. The charge is actionable but the words must be laid with the Colloquium to show that they relate to the official capacity of the J. F.)

Co. La. 557

1. Eving 280

But if the words themselves do import a reference to the J. F.'s official character no Colloquium is necessary to be laid. E. g. J. F. is a Knave (Justice)

5. Mod. 308

2. Co. La. 307

8. J. F. 501

2. J. F. 1109

And it may be laid down as a general rule (applying to all professional men to Tradesmen and mechanics as well as to men holding office) that when the words spoken are not in themselves actionable, but as they refer to some collateral thing which constitutes the ground of action, and to which the words themselves do not when they are of themselves refer, an averment of a Colloquium is necessary. E. g. to say of one who is a Dealer: "He is a Cheat".

8. J. F. 514

A Colloquium is said by Espinasse to be necessary when a Dealer is called a Bankrupt. As authorities are cited by Espinasse and see the

4. B. & C. 515

1. Eving 280

1. Eving 280

1. Eving 280

1. Eving 280

1. Eving 280

1. Eving 280

1. Eving 280

1. Eving 280

1. Eving 280

1. Eving 280

1. Eving 280, where the words were. "He is a forsworn Justice, and a Colloquium was held unnecessary. So calling a Physician. "No Scholastic"

2. Eving 62

2. Eving 1480

4. B. & C. 513

1. Eving 280

1. Eving 280

1. Eving 280

1. Eving 280

To saying of a Tradesman "Do not deal with him he is a Cheat" the Colloquium held unnecessary. So he is a Knave compounded with his Capital the Colloquium was held not necessary. 8. J. F. 502.

Of Innuendoes If the words themselves
do not show their own application by designating 4 Coke 17⁶
in express terms, the subject matter on the pre-
sented innuendoes, are necessary, eg "He (meaning the Defendant)

It is a rule laid down by Coke that " 4 Bar, 510
nothing which would otherwise remain uncertain 4 Coke 17⁶
can be removed to certainty by an innuendo

This rule is not accurate (for if taken literally 4 Coke 17⁶
an innuendo would be a new nullity), 4 Bar 73
rule thus laid down would be more accurate
"Any thing which taken in connection with all
that passed before between the parties to the con-
versation remains uncertain, cannot be made
certain by an innuendo. It can make cer-
tain only by a reference to something said, &c
before which is certain

An innuendo can therefore never extend 4 Bar 273
the meaning of the words beyond their proper im-
port. Eg "I burned my Barn" (meaning a barn 62^o 684
full of corn) the innuendo is not good. But if 4 Bar 20
it had been averred, that the Defendant had a Barn
full of corn, and that in and is about that
Barn the Defendant spoke the above words, the innu-
endo would have been good 4 Bar 834

"He stole half an acre of my corn" — 4 Bar 438
innuendo — the corn which grew on half an acre 4 Bar 82
after it was reaped, the innuendo was bad 4 Bar 1
4 Bar 684

When an innuendo is unnecessary a bad one 4 Bar 83
is sufficient. Eg. He was seized, "Innuendo, in 4 Bar 510
a

bro Eliz 609 a certain bill exhibited in such a *Case* that in
 numero is *good* but the *Declaration* is *good*
 So - "he has forsworn himself (in numero - in such
 a *Case*), this in numero is *imperfect*"

Ed. 2^d 511. So if the *person* is uncertain from the
 12 Coke 17⁶ words published, an in numero cannot make
 1st Ed. 52 certain B. 9. "One of the Servants of S. T. is a thief"
 bro Eliz 497 (in numero the *Plff*), this in numero is not good.
 Hob. 2. 45.

Ed. 2^d 514 When an action is set, for words tending to
 Hutton 44 injure one in his Trade Profession Office B. R. it
 must appear in the *Declaration* that the *Plff*
 was at the time of the words spoken of such a

bro Eliz 194 Trade Profession Office B. That the *Plff* has
 brobha 203 been a Trade Merchant B. for many years
 4th Bacon 513 past is not sufficient. True an *Ordinary* Case
 bro Eliz 273 which say he should be presumed to have been a
 1st Ed. 159 Trade at the time - see margin.
 brobha 282
 brobha 282
 1st Ed. 425;

(From this it appears that it is a *Quere* what
 argument is necessary to show that present quality
 The *Criterion* however seems to be that if it fully
 appears in the *Declaration* that the *Plff* was a
 person of Trade it is sufficient but that must
 fully appear in the *Declaration* may be *construed*
 as to. But as to what arguments do make that
 fact fully appear you perceive there are (supra)
 many *Contradictory* Cases.)

Ed. 2^d 515 So in case of a Trade it is necessary
 1st Ed. 299 viz to the English Law to aver "that he gained

his living by buying and selling (Quere would this be unlawful in the U.S. where it is settled, that a trader and one who gains his living by buying and selling are synonymous)

It is laid down in some of the Books that words of heat and passion are not actionable. The meaning of this rule is not explained in the Books. it must not however be taken literally.

Exp. 520

4th Baron 522

1 Leving 47

3d Barn 185

2d Will 335

But the rule is this "when they import no definite charge as Raged Villain Barca &c they are not actionable (these expressions of heat being mere vague terms). So perhaps when wantonly provoked in the Puff they are not actionable. But Secus if the Puff in a paroxysm of unprovoked anger utter actionable words.

Of the construction of Slander.

The rules of Law upon this subject have been at different times entirely different. Anciently actions of Slander were very rare. But in the time of James 1st they had become very common and for trivial charges to entreat this except a Statute was passed in the 21 James. (viz "that in all actions for Slander and defamation where the damages given did not amount to 4^l 0^s the Puff should receive no more cost than damages")

The C^t actuated by the same spirit of frugality mentioned adopted the mode of construction called the construction "in milioris sensu" a construction

construction which gave the slanderous word if it could possibly be done by any straining twisting or torturing an innocent meaning. Under this rule of construction the tongue of slander might inflict its wounds with impunity.

The probability of meaning in an action of slander became so extremely slight that but few were hardy enough to commence and

But afterwards observing the hardship
 4 Bacon 497 injustice and absurdity of this rule of construction
 Casp. 688 went into the opposite extreme and tortured if
 6 D. 275 possible the words into a criminal and slanderous
 4 Bacon 505 meaning and adopted the construction "in severe
 Buller 4 or a sense" The injustice of this mode of con-
 10 Mod. 198 struction was soon felt, and became ameliorated
 12 Chitly 12 by degrees to its present standard. Therefore the
 4th ed. rule of construing words in ritual sense and
 2 Mod. 159 "severe sense" are now exposed. They are to
 3d ed. 1061 be taken in that sense in which they would
 5 East 463 naturally be understood by the hearers.

When words in themselves actionable and
 2d ed. 335 not of an innocent meaning it lies on the
 1st ed. 507 party to show that they were used in that sense
 1st ed. 279 A hearer in such case may be enquired of
 2d ed. 180 how he understood them. (It seems)

When words in themselves actionable and
 4 Bacon 498 not of an innocent meaning it lies on the
 1st ed. 74 party to show that they were used in that sense
 4th ed. 805 A hearer in such case may be enquired of
 5th ed. 511 how he understood them. (It seems)

And the subsequent words may explain the for- 460ke 19^a
mer. So as to fall short of slander as in case of a Bullen 4
description added. "ut supra". 2 Mod. 459

Courts will not so violence to language Esp. 512
to find an innocent meaning. E.g. "Your Honor's wife
and died of a wound you gave her" sufficient Bullen 4
tho the wound might have been given by acci-
dent

So a forced construction will not be given Esp. 512
to make words actionable which bear an inno- Hobbs 117
cent meaning. E.g. "He is a common man
trained of skills" of a Lawyer

It is a gen^l rule that the words must be Esp. 512
be actionable import a direct charge of a 460ke 15^a
slandorous nature. If the charge can be
drawn from the words only by inference they
are not actionable. E.g. "I got his man
or by swearing and perjury" not actionable

Yet when the intent to charge a crime (or White 49 45
any thing else of which the charge is actionable) Yelverton 100
is clear the words are actionable tho somewhat Esp. 512
indirect. E.g. "I will make you an example Bullen 4
for a perjured man"

So "I will prove that he poisoned I & J" Kent 270 Title 50 l. 3

So "when will you return the sheep you have
stolen" has been decided to be actionable
Of the 1260ke 134

Of the Readings

1 Com. 196 It is laid down as a general rule that False-
 4 Bac. 512 and Malice must be averred in other words
 2d - 8 that the charge must be averred to have been
 11 Mod. 273 made falsely and maliciously in the Duke
 8 Mod. 35 action in an action of Slander Maliciously
 10 Mod. 57 seems not necessary for malice is prima facie
 implied. (Even if the words are not in them
 8 Mod. 510 solves actionableness.) It seems however that
 8 Mod. 8 the words were false is not necessary "falsely
 published" is sufficient.

1 Com. 195 The Declaration usually states that the
 11 Mod. 273 Plaintiff is of good fame reputation & that the words were
 8 Mod. 35

4 Bac. 512 The form of declaring in an action of
 11 Mod. 273 Slander is that the words were "uttered and pub-
 8 Mod. 35 lished" and to support the action it is necessary
 10 Mod. 57 that the words be uttered and published.
 But alleging that the words were spoken "privately
 and secretly" is sufficient without saying "in
 the hearing of such and such persons." So alleg-
 ing that the words were spoken "in the presence
 of several persons" is sufficient.

Malice what -

11 Mod. 273 The in general actionable words prima
 8 Mod. 35 facie imply malice. The presumption may
 10 Mod. 57 be by circumstances rebutted. E.g. In case of
 4 Bac. 512 confidential communications which exclude the
 8 Mod. 35 probability of malice as the character of the
 11 Mod. 273

Sworn given by a former master or mistress 5 Rep. 1104.
 on reasonable enquiry the facts material must 3 Rep. 587
 be proved 7 East 493

So where one confidentially and by way of
 warning to another said of a Friend "He will be a
 bankrupt soon" you had better not deal with him -
 the words were held not actionable
 the special damages were stated.

As of words used in the course of legal proceedings
 or in the course of a trial in which of the special
 facts if the Court applied to has no jurisdiction of the
 matters charged

4 Coke 14
 12 Rep. 230
 12 Rep. 131
 2 Rep. 807
 5 Rep. 106
 2 Rep. 269
 Hutton 11.

Of Retailing Slander

It is a general rule that the retailing of slander
 fabricated by another is actionable. "Sums if
 he truly name his author at the time"

2 Rep. 517
 Buller 10
 12 Rep. 133-4
 6 Rep. 400
 3 Rep. 235
 7 Rep. 17
 2 East 425

But circumstances are carefully to be re-
 garded as to the intent. (In the intent and
 manner may be such as to draw away the pre-
 sumption of malice. tho' the words were false
 and in themselves actionable thus forming an
 other exception to the general rule that words in
 themselves actionable are "innuendo" made
 civil) E.g. where one in the spirit of concert
 said "I have heard that I was charged with
 being so" No action lies

4 Bae 498.
 12 Rep. 182
 4 Coke 114
 Buller 9. 10

A deep suspicion is no justification tho' the suspicion was so probable
 as to be in themselves actionable Words

2 Rep. 518.
 6 Rep. 38.

4 Bac 448

Co bbe 297

Words uttered by persons or knowing persons
by the person of whom they are spoken will not
support an action tho' they do otherwise actions
be in themselves. Eg And you say I am per-
jured? Answer--"yes if you will have it"

Of the General Issue

15 Rep 110

Bullen 8

Esp. 503-17

1 Leviz 82

The Gen^d Issue is in England a denial
either that the Deft spoke the words or that they
are actionable for want of malice, as in the
case of Confidential Communications. "Super"

In Conn^t the Gen^d Issue includes all so
far as even that the words were true or otherwise
justified, except such as arise from some
act of the Plff amounting to a discharge.

18 Rep 354

Doe 450

Bullen 290

Esp. &c 2.6

Atwood 85

Atwood Sup

Ct August 1807

The general character of the Plff as to the
charge charged by the words may be proved in
mitigation of damages. But other particular
acts of the same kind, as those charged cannot
when the charge is of particular acts
"Scand" when this charge is general

Esp^d 518.

4 Rep 10

5 Rep 125

Hug. 1200

Hug. 372

Hug. 1200

Esp. 518.

Esp. &c 9

Esp. &c contra

In England a special justification cannot
be given in evidence under the Gen^d Issue. In Conn^t
it always may, Eg That the words were true
cannot be given in evidence under the Gen^d Issue

In England the truth of the words cannot
be given in evidence even in mitigation of damages

(For the same reason that it may not be admitted to overture the action viz that as the P^l must be ignorant of the Def^t's intention to make such a defence he is not prepared to meet it and therefore it is not allowed)

Of the justification of Slander

The truth of the words is always a good justification,

So sometimes the Def^t may justify the words ^{as} and themselves actionable and false. As when false words are published in a Court of Justice e.g. in a Declaration or Count brought by the Def^t ag^t the P^l. or in articles of the Peace 3 Esp. 32 words used in giving charge of another to an Officer.

(This is on the ground of public policy because it would have a tendency to prevent the administration of Justice if for words exhibited "ex parte" in a Court of Justice the party exhibiting the charge were to be liable for slander if in the result the words were false)

But if the party charged crimes not cognizable by the jurisdiction to which they are exhibited as a charge of Murder before the County Ct. and action laid ag^t them - it is no justification

(If their slanderous quality it is no justification to them they were exhibited in a Declaration or Count for a false charge and so exhibited to a Court not having jurisdiction it is done "ex parte" and is no justification)

4 Bac. 510
1 Rolle 87
Bullen 8. 9
also contra
4 Bac. 518
D. 496
1 Horn 194
Esp. 503
4 Coke 14
Cro El 230-48
Hobbs 82
1 Rolle 43
Hutton 173
3 Leon 138
D. 143
Dyer 285

Esp. 503
4 Coke 14
Cro El 230-48
Hobbs 207
D. 200
1 Rolle 34
1 Horn 194
See Annoted
2 Salk 1571
1 Hawk 381
D. C. 738 81
" 1 Salk 32 271
Cro El 432
5 Esp. 109
So on D. 1104

1 Bac^r 499 So on the other hand the person in such
 2^d 578 Declaration or articles of Complaint. (tho' they
 1 Rolle 87 were exhibited under oath) may justify saying
 2 Bacon 807 that the Complainant has sworn falsely. So
 this is in his defence in a course of justice

1 Com^r 194 So he may say that a witness is perjured by
 1 Rolle 33 way of objection to his admission

4 Bac^r 499 Slandrous words in a Complaint to a general
 1 Co. Lit. 247 Juror or proper Magistrate or in an indictment
 3 Sess^o 138 are not actionable
 4 Coke 14
 1 Hobart 82

3 Co. Rep. 32 So of words used in a petition to the Legist.
 1 Sess^o 131 taken for receipt of quintaries delivered to the man
 2 Bacon 810-11 Court only
 5 Co. Rep. 110

3 Co. Rep. 110 So of words used by way of reference by a
 1 Bening 178 person accused before a Church or Presbytery

So of words used in pronouncing the sentence
 2 Co. Rep. 344 of a Court Martine. E.g. That the Charges were
false malicious and groundless - this is no libel

4 Bac^r 500 Tho' if one falsely and maliciously and without
probable cause exhibits a Complaint (as a bill
 indictment &c) an action for malicious prosecution
 lies (tho' he could not maintain an
 action for Slander)

4 Bacon 500 It seems to be a general rule that in the
 3 Co. Rep. 120 above cases of Complaint &c if the Court of
 1 Sess^o 305 Justice is made a mere cloak for malice and
 1 Co. Rep. 110 action for malicious prosecution lies (It seems)
 1 Sess^o 131
 1 Sess^o 131
 1 Sess^o 131

So it is a good rule that slanderous words spoken by a witness in Court are not actionable. But he is liable as the case may be for perjury. "Sland" if he goes beyond the issue and slanders a third person. Suppose that he so slanders a party is there no remedy?

4 Baile 497
D. 518
Co. Lit. 230
2d Ed. 2. 69
Hutton 11
Esp. 514
4 Coke 14

So if one witness in testifying charges another with testifying falsely no action lies. 2 Baile 807.

Esp. 515-18
16 Ann. 131
4 Ed. 518
16 Ann. 194

When by Counsel in an Action

So that words were spoken by the Defendant as Counsel in a Cause is in some cases a good defense or justification, and in some not so.

4 Baile 518
D. 498
4 Baile 10
Co. Lit. 91
Esp. 110
note

Rule & distinction. When the words (he alleges) are pertinent to the Cause (and suggested by his client) he is not liable.

Esp. 517
16 Ann. 194
4 Baile 498
D. 518
Co. Lit. 90

But if the words are impertinent (he alleges) & told by his client) or if being pertinent they were not suggested by his client an action lies against him. Quere. as to this latter clause.

3 Baile 29
Co. Lit. 90-1

Most of the Books however make no distinction between their being suggested by the client and not suggested, &c.

Baile 10
Esp. 517
2d Ed. 87 & 230
16 Ann. 194
Baile 33

It has been said that for the purpose of mitigating damages in favour of a client an Advocate may use slanderous words not pertinent to the Cause he "quere".

4 Baile 498
Hobart 328
Baile 87
L. 10

In a subsequent Case it was held that as

* Esp. 402
4 Baile 498
D. 518

Donnell is never liable for slanderous words in
defending his clients cause. It is his duty, it is just
stated that he was influenced by his client. And
(Latt. writes & not mention the two last cases)
(These two would give a Counselor great latitude
of speech or silence; indeed it appears pretty ev-
ident that they are not Law)

500 R. 504

When there are two counts one charging
actionable words and the other words not ac-
tionable and on a plea to the whole, entire dam-
ages are given. And will be awarded and a
"verdict de novo" awarded

36oke 130

3 Wilson 177

60oke 382

788

1094

15 R. 508

532

8

7

520

130

527

"Semi" if the words are all in one count
unless in Count they are said to have spoken
at one time. R. 340. 433. 16oke 131

Of Words not in themselves actionable

In actions for words not in themselves actionable
Special damage must be stated. This is the gift
(And he must prove the special damage or
trial or he will fail in the action. For Special
damage is the gift of the action and it is suf-
ficient that they should be stated and proved be-
cause the Law does not, from slanderous words
not in themselves actionable infer damage as
it does from words actionable in themselves)

8 R. 7

520

133

58

So when the words are actionable the gift
may state and prove special damage, but in
this case he can prove no other special damage

than what is stated specifically tho he may prove
general damage as loss of customers in general
such general damage being said "given"

What amounts to an allegation of specific damage

But where the words are not in themselves
actionable it was held that specific damage
might be proved under an averment of general
damage

It is immaterial what the false words are
if they are malicious and occasion specific damage

Eg calling a single woman incontinent with
being a slut & by which she loses a mate

Of Slandering a Title.

In case of slandering a Title (as it is called) - as
calling an inn apparent a bastard it is suffi-
cient to show remote and probable damage Eg
The Duke of Devon had signified a design to disinherit
It is sufficient also that the word tend to disinherit
It is so decided in favour of the youngest son

No action lies if the Def claimed the title & then

One recovery of damage is a bar to another
action for the same words whether the words are
actionable per se or not

Of giving similar words in evidence.

It was formerly necessary to prove the words
simply as said: it is now sufficient to prove the

bro & 499
14th 494
5th 390
10th 000
11th 7
12th 85
13th 290
14th 130
15th 58
16th 000
17th 198
18th 400
19th 290
20th 520

4th 490
4th 17

10th 501
bro & 213
4th 17
4th 494
10th 38
4th 17
10th 501

4th 17

10th 519
10th 7

10th 5
10th 18
10th 521
Sub.

Est. 521 Substantive. But the sense and meaning must
 Buller 5 be the same the words & phrases must not be changed
 45 Rep. 211
 85 Rep. 130

Est. 518, In actions of Slender in general the Puff
 Buller 10 after proving the words shall may give evidence
 of other words of a similar kind. Spoken at an
 other time and even after the action bet.; and
 for this reason it is said, "to be in aggravation
 of damages"

Buller 7 But this cannot be the principle for
 Est. 520 1st Words not actionable may be thus proved.
 Hy. 591 2nd Words actionable (which may also be thus
 proved) - and foundation for a distinct action.
 3rd Words spoken after action bet. may be thus
 proved. The true object is to show malice
 (If the true reason was "to be in aggravation
 of damages" - it would be more folly to give
 similar words in evidence that are not in them-
 selves actionable; yet this is often done; but how
 such words the Law implies no damages there-
 fore they cannot enhance them. And when
 words in themselves actionable are thus given
 in evidence it is no bar to a subsequent action
 upon them. Therefore if they were when first
 given in evidence allowed to aggravate the dam-
 ages then would be no movement upon the
 same right of action: viz the first when given
 in evidence, and the second when made the ground
 of the subsequent action, and an incident allow-
 ing the law to be concluded that the reason given
 is

is not the true one viz that similar words spoken subsequent to the commencement of the action may be thus given in evidence; and it is an invariable rule of Law that there can be no recovery on any ground but that which was first asserted to the commencement of the action.

The true reason then why words are thus admitted which are not alleged in the Declaration is that the fact may be better ascertained of their alleged being malicious or not.

But when words spoken at another time *Edw. 518* are given in evidence under this rule the Defendant 10, may prove them true to rebut the inference.

When words not stated, and spoken at a different time, and proved they must be similar *Edw. 518* to those charged. In *Edw. 520* it is said "the same words" only, but in *Bullen 10* "words similar" *Do. 520* *Bullen, 10*

Our Act in Conn^o has decided agt. proving *Thirby 151* like words spoken at a different time to them *O* malicious. It has decided many times pro & con

The English Stat. of Limitations as to slander *Edw. 519* is two years from the time of uttering it. *10 Idem 95* The Stat. extends only to actionable words.

The Conn Stat. limits the action to three years. It does not extend to words not actionable.

Two persons can never join in an action of slander (And this rule applies *2 Bull 984* *Edw. 504* to

Buller 5th to see actions founded on private wrongs unless
 1 Com^o 195^a It be for some violation of a joint right)
 Dyer 16th Neither can two persons be joined in this ac-
 48 Bar^o 511 tion. as Def^{ts}. Slander not being strictly a
 Yelv. 120-1 tort which supposes an act (To constitute
 Buller 5th a tort some force is requisite either actual or
 3 Com^o 117 constructive but none can be implied either
 1 Com^o actual or constructive from Slander. It is
 therefore the private wrong - no tort)

II Libel or Slander by Writing

Esp^r 504 As to the nature of Slander by writing 1st
 3 Com^o 120 Whatever words would be actionable if spoken
 are equally so when written.

3 Bar^o 490 But written Slander is a more exaggerated
 3 Com^o 120 injury as having a more extensive circula-
tion and being always deliberately committed.

Esp^r 504 The rule does not always hold "converso" (past)
 3 Com^o 120 Yet Espinasse says Slander by writing defied
 only from Slander by words in this. That it is
 deliv^d in writing or printing. and Blackstone
 says the same rule applies to both

Perhaps his meaning is that words which
 spoken could not be slandrous are not Slander
 when written. tho' they may be actionable as being
libellous. If this is not his meaning the rule is
incorrect. The most general definition of a
 Libel

Libel is any writing of an illegal or immoral tendency. This definition is much too general to be adapted to the subject now under consideration & of a Libel as a civil injury. A more applicable definition is the following: viz -

Any malicious defamation of a person living or dead made public by writing, printing or other signs &c. - tending to excite resentment or to expose the object of it to odium, contempt or ridicule.

48 Rep 128
1 Hawk 193
6 D. 352
4 B. & M. 150
3 B. & A. 490

This definition seems chiefly to have been framed with reference to Libels as a public offence (eg. "dead persons" - "exciting resentment" &c.)

(Also as this definition seems chiefly framed with reference to Libels as a public offence it is not to be understood that every writing falling within it is as punishable as a civil injury.)

For Libels in general there are two remedies viz by Indictment and by Action.

2 B. & M. 128
3 B. & A. 492
D. 352

(The object under this head is to treat of Libel as a civil injury. Some what of the Law relating to Libel as a public offence will necessarily interfere.)

It is laid down that the general rules relating to oral slander apply to cases of Libels as civil injuries. (Quere "so the negative must as to oral slander apply?" &c. To charge with criminality)

Est. P. 504
3 Wilson 403
Fors. 898
3 B. & M. 120

(This rule must be taken with qualification) that the affirmative rules applying to oral Slander

Slaves will invariably apply to Slaves by Libel
yet that the positive rules applying to positive
Slaves will not invariably apply to unwritten
Slaves For the same words which if written
would be actionable are not invariably so when
spoken)

Est. 500

20 Bar 807

But nothing is construed a Libel which
is necessary in the regular course of legal pro-
ceedings. Eg. in a Declaration. Complaint. Affidavit &c.

10 Bar 525

5 Est. 1104

16 D. 450

8 T. Rep. 293

15 D. 748

4 B. 150

7 Hobart 353

2 Mod. 100

11 D. 99

3 B. 1250

10 D. 8-9

3 B. 1250

4 D. 150

5 T. 498

5 C. 125

2 Mod. 648

11 D. 649

An action lies not for publishing a true
account of a trial in a Ct. of Justice tho' the Publ.
character is injured by it

In a Civil action the truth of a Libel
as of words, notwithstanding, is a justification. The
contrary was once held as in 4 Bar 510. 3 D. 495 &c.

Secus on a Criminal Prosecution. There the
truth is not a justification. Tho' the falsity as
guarantees the guilt. And is the bad reputation of the
person libeled any justification.

Of Publication

Est. 510

Carth. 405

5 Mod. 103

2 Mod. 642

It is essential to the
constitution of a Libel that it be published.

But writing it originally seems to be sufficient
tho' dictated by a third person

(What will amount to a publication may
frequently be a question)

Est. 510

11 D. 59

But merely transcribing it without show-
ing it to any one is not a publication; but it is

is evidence of a publication if the Libel be made public. "And as to the first rule see Talk 419. Holt in this case in Talk. says a transcriber of a Libel is guilty of a publication, this dictum of Holt is not considered as Law.

But composing it, procuring it to be composed, reading it after he knows the contents be amount to a publication in Law. For to be wilfully or negligently instrumental in making it public is to incur the guilt of actual publication.

Est. 510
6 Coke 59⁶
5 Coke 125⁶
30 Dac. 497
1 Hawk 195

The sale of a Libel by a Bookseller or other person is "prima facie" evidence of a wilful publication, the "onus probandi" is on the bookseller. So if a sale by the Deft's servant, it is "prima facie" evidence of a wilful publication by the master.

2 John Daly 644
Baird 300
30 Dac. 497
12 Vince 229
Est. 510
5 Binn 2087

So if printing a Libel, it is "prima facie" evidence of a wilful publication.

2 John Daly 643
2 W. Bl. 1038

So sending it to the press for publication is a publication in Law, and the person sending it is guilty of publishing, when it is printed.

Est. 510
Folger 201

Signing it in the presence of others is a publication.

Est. 510
5 Binn 25⁶

But repeating part of a Libel in conversation without malice has been held to be no publication.

5 Binn 2000
Est. 510
11 W. 1027
Q. B. 843
11 W. 190

Writing it to the person who is the object of it is sufficient publication for a public prosecution.

2 John Daly 643
Est. 500-10
H. Binn 150
1 Hawk 195

But it is not a sufficient publication for a civil action. Hobart 02. 215. 12 Coke 35. 10 Mod 58.

3 Binn 117
139

Esp. 500

If the letter was a friendly exhortation is it sufficient? is a public prosecution of it conclude it is clearly not actionable

Of words actionable when written

3d Rom 120

And an libel which will support a public

3d Rom 492

prosecution actionable?

2d Rom 532

1d Rom 331

1d Rom 120

2d Rom 313

1d Rom 58

1d Rom 752

1d Rom 899

3d Rom 420

3d Rom 492

2d Rom 403

1d Rom 331

Words written are many times actionable when if spoken they would not be

(as to words actionable when written tho not so when spoken there have been but few decisions. It has however been decided that)

writing and publishing any thing falsely which makes a man odious or ridiculous is actionable. And one of the Judges (Gould) held in that case in Wilson that to write of a man that he was a "Rogue" or "Rascal" was sufficient

Esp. 518

As according to Coleridge when the writing injured the domestic heart and happiness of a family as charging a man's character with immorality or incontinence it is actionable. Coleridge here confounds the public and the private right an action would clearly lie in such case for the private honor but it is also as clear that none would lie in favour of the individual for the public dignity and this is manifest in the case here which Coleridge informs his proposition is 403

2d Rom 899

1d Rom 48

Writing or printing of a libel that is a

twice

"Sunder" is actionable. Secus if Shaken

2H. Blk. 531

The Public, Offense, and the Civil injury of a Libel are considered as created in every stage of its circulation. Therefore the same is not changed in England.

1. Rep. 571

2. D. 647

1. W. 148

As the printing specifies only the initials or one or two letters of the name of the person against whom it is intended - or a feigned name, it is a Libel, the manner being such that it must inevitably refer to the person.

3. B. 5, 493

1. Hawk. 194

Est. 500

2. Atk. 470

III Slander without words, or Libel with writing

E. G. Raising a gallows before ones door, and hanging him in effigy.

Est. 511

5. B. 125

Representing one ignominiously by painting the same in the actions. In this kind of Slander it is always necessary that the application of the Slander be made by innuendo, and arguments.

3. B. 491

Lib. Since damage must always be shown.

This kind of Slander is not actionable in itself.

Est. 511

otherwise it is not understood to be avowed at the Court.

3. B. 125-0

Scandalum magnatum Connecticutensis

By our Stat. Law in Conn. Common Slander is punishable as a public Offense, viz by a fine not exceeding 34 Dollars to the County Treasury, it is however never inflicted. Defaming a Chief Justice or any Magistrate, Judge, or Justice (respecting them)

St. Conn. 141

their judicial proceedings therein, the Offender
shall on due conviction be punished by Fine
imprisonment, or banishment or banishment
at the discretion of the Judge where the Of-
fender is convicted

Trove

3 Blom 150 This action originally lay only in Cases where one
5 Bar. 250 found the goods of another, and refused to deliver
them on demand, but converted them. Hence
it is called the action of Trove and Conversion.
And hence the averment that the goods came
into the Deft's possession by finding

3 Rees. 461
10y 62 584
2 D° 262-3
2 D° 289-242
2 D° 391

It now lies in many other Cases. The
Action is derived from the Stat Westminster 2^d
13 Edward 1st. (Being unknown to the Com Law;

5 Bar. 257
10y 62 824
10y 62 50
* 589
10y 62 31
10y 62 128

It now lies by fiction agt. one who tortiously
takes the goods of another. This it was doubted. But
(It was doubted so late as the reign of James
1st) The fiction is that the Deft. came law-
fully into the possession of the goods by finding
and then converted them to his own use. And
it is sufficient for the Deft. to prove the tortious
taking. In these cases the action of Trove
is concurrent with Trove

3 Blom 153
Butler, 33.

And this action lies in all cases in
which one who is by any means possessed of an

another's person or good. Sells them, detains them
or uses them without consent or right or wrong -
fully refuses to restore them on demand

The first instance of this action in its first
ent form was in the reign of Edward 6th. But as
actions of a similar nature had been known in the
reign of Henry 8th.

The fact of finding is now immaterial.
Conversion is the gist of the action. Finding is generally
stated in England (viz. that the goods came
into Def^t possession by finding) - but it is not al-
ways stated in England or Conn. (Now is it in-
dispensably necessary it is sufficient if the Statute
that they came lawfully into the Def^t hands.)

The manner of obtaining possession is not
inducement. Finding is not traversable.

Prove has substantive Detinue by reason of
the left certainly required in describing and describ-
ing from Page of Law

Of Conversion The general definition of
a conversion is "A wrongful assurning to dispose
of the goods of another as if they were one's own"

The Def^t by fiction is always supposed to
have gained possession lawfully. But the action
lies as well int substantive when the original pos-
session was notorious as when lawful. The gist
being conversion. And this may consist either
1st.

Est. 590 1st in an unlawful taking. 2nd an unlawful
 58 Bar 257 user. or 3rd In an unlawful detainer. The
 20 268, 269 evidence of conversion in these cases is sufficient
 Lach 655 There must be a misfeasance to constitute a
 1 Rold. 0 conversion. (It need not be a misfeasance in
 amount to a conversion, but it may be ev-
 idence of it, as a denial or refusal to restore)

Est. 589 II A tortious taking is itself a conversion in
 58 Bar 257 Law. An example usually given is that of an
 15 Bar 264 Officer taking on goods not attachable. He in such
 25 Bar 465 cases is liable in Trove, and it is sufficient for
 the Plff to prove property, and the unlawful taking.
 No demand or any thing of the kind is necessary

Est. 580 In such cases Redempt is concurrent with Trove
 3 Wilson 146 2

II By an unlawful user This supposes
 58 Bar 257 that the possession was lawful. E.g. using a
 1 Com 22 thing found. bailed &c. This is assuming good
 60 221 faith of the goods of another, as if they were his own.
 60 Eliz 2, 19 When the taking is not tortious there must be

Est. 580, some evidence of an actual conversion as in
 the last and following examples.

1 Com 221 Misusing a thing entrusted to one's care,
 2 Lach 655 found &c is an unlawful user, and so a con-
 20 Bar 312 version. If a carrier of a box of goods breaks it
 25 Bar 753 open or sells it.

60 Bar 216 Throwing goods found into the water

31 Com 153 If a bailee of goods retains them. Redempt it

60 Bar 216
 31 Com 153
 60 Bar 216
 31 Com 153

is said is Consistent with Trover. The Bailment
is extinguished. See Full Bailment

2d Ralee, 555
5th Am. 381
Moore 248

Drawing back of a cask of wine, and filling
it with water, is a conversion of the whole.
This is a wrongful assuming to dispose of the goods
of another, as if they were his own

Edw. 581
1st Am. 221
Sty. 576

But negligent custody of a thing, is not un
lawful used. It is not a misfeasance which I
have remarked above is necessary to constitute
a conversion. So there is no conversion. "E.g. A
piece of cloth suffered it to be misused."

Edw. 580
D. 590
Hobart 257
8 Coke 140
Jones. 48
Edw. 917

So if perishable articles are suffered to be
spoiled for want of care. See 319, Edw. 909,
Tack 555, D. 143, 1st Ralee 2, 1st Bar. 243, 5th Bar. 269.

1st Ralee 6, 6, 5
5th Bar. 282
1st Bar. 48
1st Bar. 252
5th Bar. 258
Hobart 17

A similar action on the Case lies in the
case of the Trover. Supra

Edw. 590
Tack 555
Edw. 917
1st Bar. 252
Jones, B. 48

And so agt. the Common Carrier. Tack 555, Edw. 587
If a Carrier of goods loses them. Trover, does
not lie. (It is a non-feasance, and there-
fore no conversion). But the Bailor of the goods
may have his remedy by a specific action on
the Case, according to the Custom of the Realm.

Tack. 555
D. 143
- of Trover

If unlawful used consists in selling the
property. Trover, Ag. is consistent to recover the
money paid for, for money had, and received

Bulwer 131
Cawth. 419
25th Bar. 144
1st Bar. 387
5th Bar. 597

(In the action of Trover & Ag. the verdict is con
sistent.)

Considered a Trustee for the benefit of the price of the Goods Sold. which price is recovered by the Plaintiff.

In the action of Trover the value of the Goods Sold is the rule of damages. Consequently the owner of the Goods may by electing his action, recover at his choice the price of the Goods sold or their value not regarding the price.

III Unlawful Detainer is a Conversion

Case 589

Wm 590

1 Page 204

As if the Deft wrongfully refused to deliver on demand. If indeed there has been an actual conversion, as by selling, destroying, selling to a third person and so forth, and not necessary to the right of action, the the possession was lawfully

Case 590

2d Ed. 312

Case 529

2 Shaw 101

2d Ed. 752

Case 582

2d Ed. 930

4d Ed. 2221

Case 555

Case 590

5d Ed. 2827

2d Ed. 752

*Case 590

1d Ed. 131

Case 435-50

3d Ed. 153

Foot. 187

2 Shaw 179

But a refusal to deliver on demand is not itself a conversion, or unlawful detainer, for it may be justifiable, as e.g., not sufficient evidence of ownership, or a demand made on the property as an Intakeeper, a Carrier, or a person who may have been destroyed without the Deft's fault, or lost or stolen "in transitu".

A demand and refusal therefore are only evidence of a conversion or unlawful detainer. And only "prima facie" evidence 10 Coke 56, 57. Case 590, 3d Ed. 1243, 2d Ed. 135-6. This is denied in 6 Mod 112. Moore 400. and said to be a conversion. But see Casper 529. (The proposition is however unquestionably true.)

Owner of the goods only demand, and refused the C cannot divide the D^d for the fact of conversion is still to be found

Est^d 590
10 Cts 50
Gro 897.450
Hans 48
30 Dec 1843

It is a rule of Law that a Person of Goods has no lien on them for his expense and trouble. He cannot justly be retained. ⁴ *haden in Cont. su-* page 17

If one having goods of another puts them into the hands of a third person, ag^t the Command of the owner this is a Conversion

A servant is liable for a conversion by himself tho to the use of his master and even by the Master's order

As Timber being on B's Land A asked leave to take it; B refused B was held not guilty of a conversion. There was no intermeddling, no misfeasance.

Est^d 581
45 Dec 200
Est^d 580-0
18 Jan 328
Sly 813
1 Jan 221
Bale 47
2 Dec 242
5 Dec 259
D^d 2 Jan 229
2 Dec 310
2 Dec 245
5 Dec 178.4
2 Dec 257-8

Who may maintain Trover

If goods are sent by A to B, not to rest in B but in order to answer a particular purpose for D. A which cannot be answered A may recover for them after demand

Suppose A sends the goods of B. C claims them. Sues A on refused to deliver and moved the value. B then sues and proves his property. Can B recover? (It has been decided in *Corp* that B could recover and it was obliged to pay the value of the goods the second time. There is no exception

15 Dec 215
D^d 495

decision held, found in the English Books, but
 Mr. Gould thinks that decision in *Comp* is inco-
 nistent. Somebody must suffer, either A the find-
 er or B the owner. It is not likely that a remedy
 can be had agt. C. we take that for granted
 and he thinks the loss ought to fall on B
 on principles of justice. The finder having acted
 with negligence and having done a neighborly
 act and refused to deliver them to C. the pay-
 ment not being voluntary but by compulsion
 of Law. He ought not to be compelled to
 pay the value of the goods the second time.

And it is a rule that when the Law com-
 pels a person to pay money over to another
 he cannot be subjected to pay it again tho'
 the person to whom it was paid had no right
 to it. If A had paid it voluntarily to C un-
 doubtedly he would be liable to B, but that is
 not the case. See Title Bailments.)

35 Rep 125

2 B & C 11

1 K & H 689

5 C 682

2 Larcas 54

Analogous Cases may be adduced. A
 will mention one. If Administration is
 granted to a wrong person, and he goes on and
 settles the debts due to the Estate, and after
 this the letters of Administration are repeated
 and Administration granted anew to the right
 full person, this right full Adm cannot compel
 the Debtors to pay a second time because they
 had once paid their debts to a person having
 authority by Law to demand them.

B

It is not necessary for the Def^t to have had the absolute ownership of the thing. E.g. a Bailor may maintain the action ag^t a third person "the having the general property" - See Bailments

5 Bac. 281
2 Rolle 589
1 Esp. 438
Letch 314

So a Bailor having special property may perhaps in all cases maintain the action ag^t a stranger. As e.g. a common carrier a special carrier. an agent See Esp. 577. 1 Mod. 31.

13 Bac. 44
Pake 40
3 Esp. 140
1 Com. 218
Roke 46 52
5 Bac. 105
D. 200
Moore 545
Lalk. 143

So a thief who has taken goods in Ex^{on} may maintain it

1 Levin 282
Butler 33
2 Ld. 47 n^t

So a Def^t in years of a House blown down may have trover for the timber ag^t a stranger who carries it away. He has the special property

Butler 33
Esp. 577.

So possession alone gives a right to maintain the action ag^t all but the owner. E.g. when one lends goods. This gives him a kind of property which will support this action ag^t third persons.

Esp. 575
1 Com. 219
Esp. 588
D. 777
Butler 33
2 Ld. 47 n^t
See Levin 282
5 Coke 24
3 Wilson 332

But the possession must be acquired either legally or under claim and colour of right for if gained without colour of right it gives no special property ag^t strangers

3 Wilson 338
2 Ld. 47 n^t

So a right of possession is sufficient. As when the Def^t having goods of T's was obliged to deliver them to the T's creditor - action lay. tho the Def^t never had possession. 2 Ld. 47 n^t

Esp. 570
Bast. 88
1 Com. 219
1 Bac. 242
Rolle 500
75 Def. 9
120 480

But a property of some kind is necessary

Sack^d 18 For when the P^{ff} had sent an order for goods to
 30 R^W 180 his servant and the tradesman delivered them to
 Esp^d 570 the servant's last action is not in agt^t the
 Bacon 350 Host in favour of the purchaser. For no property
 vested in him for want of delivery. Secus if
 Bacon 30 they had been delivered to the servant of the P^{ff}

Bacon 441 An unauthenticated Bankrupt may maintain this action agt^t a stranger
 Rake 140
 38 Esp^d 140
 Cowper 509

Esp^d 578 For much (at C. Law) an Ex^{or} & Adm^r could
 1 Com^s 219 not maintain the action for conversion in the
 Cro Eliz 377 testator's or intestate's life time. Now he may
 Esp^d 539 by the Equity of the Statth 4 Edward 3^d "he ad p^{re}
 Aug^d 60 latet &c. I suppose
 2 Mod^d 108

1 Com^s 231 It is lessen that an avowment of conversion
 Esp^d 589 in the intestate's life time is supported by
 Aug^d 60 proof of taking in his life time, and using
 a thru and for the time being lay in the
 * Esp^d 579 knowledge of the death, what then? was not the
 1 Vent^d 280 taking notorious? The Ct considered the conversion
complete in the intestate's life time

18 Bacon 249 The Bailed right is said to be founded on the
 13 Coke 69 own liability over to the Bailor (i.e. if do at all)
 23 Ad. 89 If conceived in the possibility of his being liable, and
 32 92 this always exists
 5 Bacon 104
 D^r 202
 Co Litt 89
 15 Ed^d 458

It is doubted in the case of a Depository
 18 Bac 105 p^{er} 22 If not the original property sufficient to back the pledge?
 Jones 33 112 In the case of the Fixed Super possession only is
 held sufficient. Besides he may be liable &c

No bail is liable in all events. Policy requires it sometimes. — See Bailments.

If one delivers to A the goods of S. the Bailor by delivering them back to the Bailee exonerates himself from liability. I S. claim, and such deliver is effectual to bar an action by S. even if the deliver back is pending the action.

KBac? 237
Do 242
Roe 508-7
2d AB 137
See Bailments.

(Suppose the Def. knowing the property to be, I S. has refused to deliver to him, is not this evidence of an unlawful detainer?)

A recovery by the Bailee vests the Bailee of his action for the full value, and "vice versa." page 51.

136th 69
5Bac? 165
Do 203
2Roe 509
See Bailments +

So the Bailee by suing the wrongdoer first vests the Bailee of his action. It seems that commencing the action attracts a right of removal. So if the Bailee sues first the Bailee is ousted of his action of Trover for the full value. (But he may have an action for his special damage.)

Vol 2^d 43-4
See Bailments.

There are no direct decisions to this point but it is supported by analogies as C. G. in an action of Trover by a master or servant. So also if a creditor has commenced an action agt. a Sheriff for an escape and the prisoner returns the action is not to be barred but the creditor may proceed to judgment agt. the Sheriff.

3Bac? 559
Litch 127.
4th 446
Do 52
2Litch 873
1st 557
Vol 2^d 434

A Bailee by suing the wrongdoer discharges the Bailee. He elects his remedy. I conceive says Mr. Jones "the three are no authorities that this

See Bailments

is correct, and Judge Reeves is of the same opinion. It is a correct proposition if the other rule is sound, viz. that the Bailor by first commencing his action agt. the wrongdoer vests the Bailor of his action, and this I take to be correct. And there is an analogy between this case and a case where an action is brought agt. Receivers. If an action is brought agt. Receivers, Coke says the party waives his remedy agt. the Sheriff, - and the reason is the same in this case.)

On the other hand if the Bailor sues first he makes himself liable to the Bailor (For says Mr Gould in 2d Bailments) he thus takes away the Bailor's remedy agt. the wrongdoer. This rule is correct if the last one is. If that is incorrect, so is this, this being merely a corollary of that.)

* See
2 Bailments
784, 12

In 13 Coke 69 it is said that he who has the Special property shall have Respect to his action (Trove), agt. him who has the General property. (And that the possession of the Plf. may go in mitigation of damages. But I conceive says Mr Gould that whenever any thing goes in mitigation of damages when the right of action accrued there must have been a right of action to remove for the Shed, but here he has not a right of action to remove the whole.) Judge Reeves in his

Page 51-2

* See
58 Ba 485
20 - 200
2 Bailments

Lectures said there a different rule, and that the Bailor may have a Special action on the case to recover Special damages*. But why may the

he had trespass, or Trover agt. the Bailor &
 The action is not for the loss of property, but for
 the use of it - of the special interest. The value
 of the property is not even prima facie the rule
 of damages.

Returning the goods after conversion to the
 Plaintiff does not oust his right of recovery; it only
 mitigates the damages. But when the conver-
 sion consists in a notorious taking if the Deft
 delivers it on demand, no damages can be recover-
 ed for the taking, that is waived in this action.

Essex. 581
 5 Bae. 280
 5 Mead. 212
 6 Co. Sa. 148
 1 Com. 231
 12 Bl. 524
 23 R. Rep. 902
 * 10 Bun. 31.
 5 R. Rep. 690

A recovery in Trover vests the property in the
 Plaintiff, except when it has been returned (before
 verdict). A forced recovery agt. a stranger is a
 good bar to the action.

Essex. 593
 1 Shaw. 140
 1078
 5 Bae. 257

There can be but one recovery.

Essex. 593
 6 Co. Sa. 73
 1078

So a recovery in Trespass - the property ha-
 ving been sold is a bar.

5 Bae. 280
 12 R. 1217

So in Trespass, when concurrent

Essex. 593

(If the Plaintiff has had a recovery in any concu-
 rent action it is a bar to this. If the Deft
 would plead the former recovery, he must then
 specially if it were by the action of Trespass
 that it was for the identical wrong laid in the
 present action as a conversion. So if it were
 by the action of Trespass - that the promise
 grew out of the same conversion which is the gist
 of the present action, but it seems that the former re-
 covery may in England be exhibited in indifferent under
 the Gen. Issue.)

12 R. 1217
 Essex. 593

Against whom Trover will lie

It will lie agt^d a wrongful Taker, or agt^d a Bailee (who unlawfully used or detains his Bailor's goods) - or agt^d a Finder of Goods (who does not restore them to the owner on demand and satisfactorily evidence of ownership) or agt^d the Servant of the owner who delivers his goods over to a third person.

And it is a General Rule that the owner of

Strij ^d 1187	property may in England maintain Trover not
1 Whig ^d 8	only agt ^d the <u>first</u> but any subsequent holder
20 ^d 579	even a <u>bona fide</u> purchaser. E.g. a Bailee or
Talk ^d 283	Finder sells the goods. <u>Provided</u> the sale was
1 Leon ^d 108	not in <u>market overt</u> . But even then it would
13 Jac ^d 237	lie if the sale in market overt was by <u>Cover</u>
50 ^d 500-6	
20 B ^d 450	
Est ^d 579	
1 Leon ^d 158	

There is an exception to the English rule

13 B ^d 452	above. (so far as related to other than <u>first-takers</u>)
20 ^d 457	in case of <u>Money</u> and <u>Bills of Exchange</u> . Trover
Talk ^d 120	for these can only be brought agt ^d the <u>first-taker</u> by
12 B ^d 738	reason of their <u>currency</u> when they have been
Est ^d 39	paid over to a third person on a <u>bona fide</u> con-
20 ^d 580	sideration. Reason and Policy require it
30 B ^d 1510	
10 B ^d 480	
10 Doug ^d 011	

For what Trover lies

10 B^d 190
20^d 202
Est^d 543
20^d 588
1 B^d 219
10 B^d 637
10 B^d 20
10 B^d 138
10 B^d 117
20 B^d 708

It lies for personal chattels in general. This action lies for chores in action of any kind, tho' only evidence of property, and the value need not be alleged. Talk^d 130, 283, 654

(An

(An accurate description of it is not required because the case in action is supposed to be in the true Civ. 723 (Duff's possession) but if he attempts to be exact in the value of it and the sum he recovers is, so he will fail in his action)

This action lies for False Goods

It lies not in general for animals "Ferae Naturae" (Quod est confusum and valuable) Tho for such reclaimed animals it does. E.g. a Hawk

Est. 543

gallied
2 Rep. 708
41 Hen. 235
1 Com. 219
10 Mod. 5
5 Bac. 263
Kj. 13. 80

Hobart 283

Law. 125

11 Mod. 283

60 Hen. 202

5 Bac. 264

1 Com. 219

5 Bac. 263

20 Reg. 140

Cart. 397

20 Reg. 124

3 Lev. 330

5 Bac. 264

Head. 111

Est. 542

It lies for stolen Animals as Dogs. So in some cases tho not reclaimed being merchandise and valuable as Monkeys, Parrots &c

It lies not for a Negro Slave in England or Corp. 2 Lev. 201. contra 3 Hild. 780

It lies not for the conviction of a Record because it is not private property it is a public office. It does lie for a Copy of the Record (that being considered private property)

It has been holden that it lies not for Money unless in a bag so that it might be identified as in Odin.

Law. 125

20 Reg. 140

Cart. 397

20 Reg. 124

3 Lev. 330

5 Bac. 264

Head. 111

Est. 542

Law. 125

20 Reg. 140

Cart. 397

20 Reg. 124

3 Lev. 330

5 Bac. 264

Head. 111

Est. 542

Law. 125

20 Reg. 140

Cart. 397

20 Reg. 124

3 Lev. 330

5 Bac. 264

Head. 111

Est. 542

Law. 125

20 Reg. 140

Cart. 397

20 Reg. 124

3 Lev. 330

5 Bac. 264

Head. 111

Est. 542

Law. 125

20 Reg. 140

Cart. 397

20 Reg. 124

3 Lev. 330

5 Bac. 264

Head. 111

Est. 542

Law. 125

20 Reg. 140

Cart. 397

20 Reg. 124

3 Lev. 330

5 Bac. 264

Head. 111

Est. 542

Law. 125

20 Reg. 140

Cart. 397

20 Reg. 124

3 Lev. 330

5 Bac. 264

Head. 111

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Law. 125

20 Reg. 140

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20 Reg. 124

3 Lev. 330

5 Bac. 264

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Law. 125

20 Reg. 140

Cart. 397

20 Reg. 124

3 Lev. 330

5 Bac. 264

Head. 111

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20 Reg. 124

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3 Lev. 330

5 Bac. 264

Head. 111

Est. 542

Law. 125

20 Reg. 140

Cart. 397

20 Reg. 124

3 Lev. 330

5 Bac. 264

De Baur 264
 Law 244
 Esp. 590
 Bullen 72
 4th ed. 83
 2d ed. 910

When Goods are pawned the Pawnor may main-
 tain Trover after Reposs of the money Tulk 522
 1st ed. 220. 4th ed. 258, see Bailments.

15th ed. 153

If pawned on an Unsound Contract the
 Pawnor cannot maintain Trover, till he has
 repaid the money advanced, and it seems the in-
 terest. The action being not to enforce, but to re-
 lieve against the Contract. Trover is an equitable
 action. (The Dft must therefore come into Ct
 with Equity on his side, and for this reason it
 seems that not only the principal but the interest
 should be repaid as in justice so much is
 due the Dft. and it seems that until he has
 done so he cannot support this action. tho the
 whole Contract of the payment and the pledge
 is strictly void.)

Esp. 577

De Baur 239
 2d ed. 301

A pawned gift of Goods without some act
 of delivery does not transfer the property of Goods
 and the action will lie in such case against the Donee
 he having taken possession. Quere without demand?
 would not the gift by pawn be a licence?

2d ed. 553

1st ed. 192

But delivery the key of the room where
 the Goods are kept to the Donee is sufficient.

Law 450

1st ed. 301

Esp. 380

Tulk 290

De Baur 280

15th ed. 658

4th ed. 206

1st ed. 303

One Tenant in Common or Joint Tenant
 if a Chanc. cannot maintain this action against his
 companion, advantage may be taken of it on
 "not guilty" (and need not be pleaded in abatement)
 The possession of one is the possession of both. See

"Secret" if it be destroyed
 It is not any one only right a stranger a plea in abate-
 ment (is the proper way to take advantage of the
 nonjoinder) —————

1 East 308
 Buller 34-4
 Felt 290
 2 Lender 113
 Co. L. 544
 Est. 477
 Litt. 323
 Felt 4

The action being for conversion of Personal property only. Seizing a thing from another Freehold is not a conversion. Attacking a Door from its place and carrying it away. But if the avowment is "possessed as of his own good" — Seizure — is presumed after verdict.

But tortiously taking a thing already severed is a conversion

Nov 125
 5 Bar 257

Throwing goods overboard to save a ship is no conversion

5 Bar 258
 3 B. & M. 280

The Declaration must state a plea or it is ill in substance. (The omission of stating the plea when he is cured by verdict (it seems))

Est. 588
 Co. L. 78
 2 B. & M. 30

The Declaration in Trow ought to show how fully in the "plea" but stating "possession" as of his own good — is sufficient. It is not necessary to state a demand and refusal

Moore 891
 Head 111
 Com. 322
 5 Bar 271
 2 Lender 374
 Sty. 1023

The time of conversion must be averred in one case for the omission Judge was arrested. When the time of conversion was laid before the Court the — "afterwards converted" — was held sufficient and the "plea" void. "Quare" as to the arrest of Judge. (The omission to state the time it seems, is cured by verdict. When the Court is called in 1 East 135. Proof of conversion on any

Est. 588
 1 East 135
 Co. L. 428
 1 Com. 224
 Co. L. 27
 3 B. & M. 394
 Co. L. 389
 Co. L. 428
 5 B. & M. 310

any other day than that stated and sufficiently
 support the Declaration, if it be not over
 in the Stat. of Limitations)

1843 1143.17

1844 301

Est. 587-8

2844 588

2844 170

2844 49

2844 999

2844 148

2844 407

2844 430

2844 275

2844 542

1844 305

2844 270

2844 60

2844 189

2844 140

2844 73

2844 1078

2844 534

2844 503

2844 543

2844 48

2844 189

2844 140

2844 73

2844 1078

2844 534

2844 503

2844 543

2844 48

The thing must be described with con-
 venient certainty. Formerly it must have been
 described with great accuracy. Buller 37, 86

As to the necessity of alleging the value of the
 Goods vide 5 Bac 275, 6 Sa 130, 147-8. Price and
 value vide 5 Bac 275, 88. The value need not be
 stated according to Est. 588. (Falsely laid
 down in Est. 588)

It is said that there are only two
 good pleas in Trow. Gen. Off. and Release
 (Because that any other facts than a release
 or some other subsequent thing operating as a
 discharge, will amount to the Gen. Off. tho'
 specially pleaded, and because any other plea
 must admit the fact of a conversion, and that
 being a tort & Law importing an act "falsely"
 wrongful can never be justified. Yet notwith-
 standing this technical propriety of the rule
 it is not attended to in practice for many
 years have been allowed

That a justification may be given in
 some under the Gen. Off. (Any thing but
 a release may be given in evidence under the
 Gen. Off.) Pleas in Conn. Stat. of Limita-
 tions in Conn. do not run agt. those even when
 connected with the Stat. so decided by Sup. Ct.

Action of Assault & Battery

An Assault is an attempted or offer to do a corporal hurt to another by force without touching & lifting a weapon, or fist in a threatening manner. So presenting a gun, drawing, and waving a sword, - pointing a Pistol fork. &c. at one within the reach of it. Any unlawful setting upon the person &c. by an offer to beat. This is an inchoate violence, and amounts to an injury tho' no actual damage.

But a gesture otherwise amounting to an assault may be explained by words so as to fall short of an assault. E.g. A lays his hand on his sword and says "If I were not affrighted time for the intent must operate with the act to constitute an assault. Words alone then cannot amount to an assault. The ancient opinions were contra. (But threats of bodily hurt amounting actual inconvenience is an injury & interrupting ones business. *Termes, &c.*)

Battery consists in the actual commission of violence upon the person of another. The least degree of it done in an angry, spiteful, insolent or rude manner is a battery. E.g. Shoving in the face, beating on the head. The unlawful beating of another. Quare, is a battery of course

1 Bac. 154

3 Broom 120

Est. 312

Butler 15

2 Rolle 545

1 Vent. 250

1 Hawk 133

Fenist 202

3 Broom 120

3 Broom 85

1 Bac. 154

1 Mod. 3

Est. 312

10 Mod. 187

2 Hale 545

1 Bacon 154

1 Hawk 133

2 Rolle 545

1 Com. 590

3 Broom 120

Est. 312

1 Bac. 154

6 Mod. 149

D. 172

1 Com. 589

1 Hawk 134

3 Broom 120
Tack 407
unlawful? for it may be justified (Mr. Paine
says Blackstone's definition is incorrect. For the
above reason "that it may be justified" Mr.)

1 Bae 154
1 Hawk 134
Tack 384
Every Battery includes an assault. (But the
word does not hold conversely) - proof of battery will
therefore support a charge of assault and battery

Menard of bodily hurt tho not amounting to
3 Broom 120 assault. For words alone cannot constitute an as-
sault, are in some cases actionable injuries
Tack 202 when they occasion an inconvenience then are
1 Com 590-1 actionable. otherwise not. The action is trespass
2 Rolle 545
3 Broom 120 vi et armis for the inchoate violence.
2 Rolle 545

In Battery the injury must be immediate
But it is not necessary to battery that the injury
3 Wilson 403 should be the instantaneous effect of the act of the
2 Rolle 892 wrongdoer. It is sufficient if it be produced by a
Tack 634 connected train of effects. In general any volun-
tary act by which one causes a battery supports
the action. Thus 1 Ventris 295. Eg. The D^{ft}
threw a squib into the market place which
eventually hit out the P^l's eye

For the particular distinctions between Tres-
pass and Case vide title Trespass on the Case

Egg 313
2 Buller 10
So if one pushed another wantonly or care-
lessly and the latter falls agt a third the action
lies agt the first

Egg 313
1 Mead 24
If a Horse taking a sudden fright
runs agt a person the rider is not liable if it
was not

not his act. But if a third person struck the horse 4th Mo. 405
 he would be liable for all consequential injury. 1 Com. 389
 "Buller" says that he is liable in an action on the Buller 10
 case. Quere Salk 537 argued and see Putt on the case

When a person receives bodily hurt from an act to which he consented, he may sometimes have an action and in other cases it is said not.
Rule. If the act consented to was legal, he has no remedy. Q. F. Hunt by playing at cards &c. &c. it promoted courage. Hunt by boxing a cow - Buller 10
 sent to be has an action for boxing is unlawful 2 Leving 174
 and consent could not make it lawful and "Volenti non fit injuria" does not apply the cow sent is void. Quere are not both particeps criminis?

So consenting to be beaten does not justify the beating. Quere in the civil action? Esth. 313
 Com. 318
 Buller 17

But that the injury happened in an amicable contact as wrestling is a good excuse the cow sent is good. Quere in defending himself accidental? 2 K. 890
 by hurt another behind him he is liable to this action. 408.

A malicious intent is clearly not sufficient to subject to the action of trespass &c. Quere if it is not. Lat. 13
 For a Quare is liable to it civiliter tho' not crim. 110
 maliter. It is a per note that in case arising 399
 "ex delicto" imputed of intention &c. cases. But 1 Com. 204
 it is not universal. 19

But how far accident will excuse an

involuntary trespass has been a question of some difficulty? According to Poulblague is it sufficient to make one liable if he has been the physical cause of damage. This is too broad a rule for it would not admit of even inevitable accident as an excuse. If the injury happen by the fault of the party injured. It is an excuse.

Hob. 134

Poulbl. 81

Hob. 134

Com. 589

Acad. 35

2 Pol. 548

3 Wilson 377

2 Hob. 850

3 Wilson 410

It is said that "inevitable accident" or "inevitable necessity" only shall excuse. Reg. 390.

Measure of inevitable what? That the accident should be physically unavoidable? (As Est. 313 so the case in Bullen 10) Seems not to be Law when a distinction is taken between wantonly pushing a drunken man against another, and attempting to assist him, for in the latter case the accident is not physically unavoidable. And in Hobart 104. the Op. of the Jury, into the word "inevitable" argue on the ground of mis luck; he is excused if acting without his fault.

Hob. 134

Bullen 10 supposes that if a Horse used to run away with the rider takes a fright and in running injures another the rider would be liable on the ground of neglect.

And yet the immediate injury would seem as physically inevitable as if the Horse were not addicted to running away. But here the remedy

West. 295

would be case for neglect. As in the rider's act. Most of the examples given suppose

some

some neglect as the case put of cutting a hedge of
thorns which fell on the ~~Defendant~~ and there was neglect
So in the case of dropping a bag. So in the case
of catching the gun. So where it tumbled from
on ~~Defendant~~ Land. Action on the case.

The rule is clear that where the injury
is inevitable the Def^t is excused. Eg one taken
with the ~~apoplexy~~ falls off a ladder. (The injury
can't be said to be inevitable when the act
causing it is voluntary, i.e. when the act is not
the effect of a cause above the agent's control)
But still there is no liability, if the party inju-
red is himself the faulty cause. See "Post"

In other cases according to some opinions
if the act causing the damage is lawful, and
the agent guilty of no neglect, no want of care
- he is excused. Eg helping a drunken man
as put in Buller ND 10-17. See ~~quid~~ the better
opinion seems to be the injury must be inevitable

In the case in 4 Burr 2092 (case of a
man killed by the Def^t's dog) the Def^t would not be
considered as the agent, ~~and~~ the act his, unless the
injury was voluntary on his part (when the in-
jury is ~~voluntary~~ the author of it is undoubtedly liable)

But when the act causing the damage
is unlawful the author is in some way either
in trespass or case liable at all events whether
there is the least neglect or not for the consequences
in

The Reg^d 457Hug^d 590

4 Burr 2092

Esp^d 383

2 H Blk 2578

Hob^d 134

2 H Blk 890

3 Wilson 377

Esp^d 599

Bulmer 1510

Esp^d 313

D. 317

et supra

5 Bae 108

2 H Blk 893

Esp^d 480

D. 1574

12 H Blk 589

Kent 295

immediate or mediate

The above rules as to accident & attempt
to be treated in general

The Defences to this Action

(To the action of trespass &c it is added for assault
and Battery then and) Three kinds of Defences viz
Denial or Inficiation, which is a denial of the
fact. Excuse, (which admits the fact but
pleads it was owing to inevitable accident.
This may all be given in evidence under the
Gen. Issue) - and Justification (which is the
insisting upon something which made it law-
ful for the Deft to commit the battery and a
defence of this kind is usually for assault &c
(1 Com 589 note.) - Assault and Battery are justifiable in
3 B Com 120, many cases C.C.

An Officer having legal pro-
cess to arrest one may use violence in case of
opposition so far as is necessary to effect the
arrest. But a battery is not justifiable in this
case unless there is actual resistance or an
attempt to escape. An arrest simply will
justify an assault only.
But a "molested man in prison" is
making the arrest, is justified tho' no resistance be
shown. A plea of "molested man in prison" goes
to the justification of the battery as well as of the as-
sault 5 Com 355. Skinner 38; Cro E 34. 2 Vent 193. Cal
not

Bullen 17

1 Com 589

3 B Com 120

C. C. 314

1 B Com 155

1 Hawk 130

2 R. & J. 329

2 Str. 1049

Bullen 18, 19

C. C. 314

3 Levins 403

Cro E 34

2 Str. 1049

2 Rol. 540

1 B Com 155

Bullen 19

5 Com 355

C. C. 314

not of bruising & wounding &c. - - - - - 85 Rep. 299

Batter is justified on the ground of self 3d Rom. 120
 defence. As if one strikes me first I may 1 Com. 589
 strike him. So an assault by the P^l is suf- Batter 17:18
 ficient to justify a battery by the D^f. As if the Est. 315
 P^l left a weapon. &c. Plea for assault & murder

But there must be some proportion be-
 tween the assault or battery by the P^l and that
 by the D^f. For every assault &c. however small 11 Mod. 43
 will not justify every battery however great and Batter 18.
 the proportion is a question of evidence. A small
 blow will not justify a mayhem. The P^l Salk. 642
 strikes the D^f on the head immediately cut off and Sid. 240
 the P^l is mayhemed, here the D^f is justified. Est. 315
 And if the P^l gives a slight blow and the
 D^f in return strikes so as to mayhem. -

The plea in this case is "An assault & murder" 12 Rep. 447
 i.e. that the first assault proceeded from the P^l Est. 315
 and that the D^f struck in self defence. Salk. 642
 But mayhem it seems is not justified by the 12 Rep. 177
 P^l's aggression unless the P^l's act might endanger Est. 315
 the D^f's life or member. Salk. 642
 11 Mod. 43
 7 Com. 590

As to the replication de injuria See 8 Coke 60. 11 Rep. 70

If the P^l was the blameworthy cause of the
 battery (tho he did not strike or threaten to strike) 12 Rep. 177
 the D^f is justified in some cases. As when the Salk. 642
 P^l killed the seat on which the D^f was sitting
 and the D^f cut off the P^l's finger. But

11 Mod 43 But the manum in this case seems to have
 20 Ray 177 been justified by the D^{ty} attempting to gauge
 the D^{ty} (according to 11 Mod 43. 20 Ray 177)

20 Ray 315 So when the D^{ty} thrust his money into the
 Co's 2000 D^{ty} heap and a S^{er} and the D^{ty} justified

20 Ray 315 Parents are justified in giving a child
 10 Ray 1707 reasonable correction a Master his Servant
 1 Hawk 130 a Schoolmaster his Schollars a gaoler his prisoner
 Bullen 18- the relationship constitutes the justification,

1 Hawk 130 So answering to some a Husband his Wife
 20 Ray 80 These relations constitute a prima justification
 1 Bat 155

20 Ray 314 A man may justify a battery in defence
 Bullen 18 of his Wife and conversos. So of Parent & Child
 10 Ray 62 of his Wife and conversos. So of Parent & Child
 20 Ray 558 Clearly a Servant may justify in defence of
 20 Ray 314 his Master. But conversos know? 20 Ray 553
 Bullen 18, 19 20 Ray 540 20 Ray 429. 5 Hawk 354.
 20 Ray 540 20 Ray 484
 1 Hawk 407

20 Ray 318 But the battery must have been in de-
 20 Ray 624 fence of the Wife &c to prevent her from be-
 ing injured and not vindictive. See reason

So one may justify battery in defence
 20 Ray 314 of his property forcibly invaded as by break-
 Bullen 19 ing a door. Gale &c But if there is nothing
 Salt 544 more than a mere entry on a man's Close
 1 Hawk 130 which implies force in Law only the owner
 is not justified in a battery without a re-
 quest to depart

Bullen 18, 19 In case of entry on Land, how ever the
 20 Ray 314-15

battery must in proceeding be justified not as a
battery but as a qualified manner in person

2d Ray 102
Salk 407
5 Com 345
1st Wm 30
8th Rep 78
Cantw.

The last must contemplate the owner of
property in possession and relate to his right of
defending his possession. But when he is dispossessed
or dispossessed a different rule now obtains that
as to real property not known at C. Law

At C. Law one who had a right of possession
him or enter on land was allowed to regain
possession by force from the disseisor or dispossessor
of land

2d Bac 535
3d Bone 179
4th 148

But now by several English Statutes
(the first of which is the 5 Richard 2nd) one may
not enter on land or take another is in
possession (as by holding over after a term
expired or taking a vagrant possession) except
in a peaceable manner. The Law is the
same by Statute in Conn.

2d Bac 535
4th Bone 148
3d 179
St. Conn 204

That Statute contemplates only posses-
sions which are in some way and in some
degree abandoned by the owner. As in the
case of a lease when the possession is given to
the lessee; and in case of land of which the
possession is neglected by the owner, and vagrant

Merely taking a possession is not an aban-
donment so as to exclude the owner's right to
use. See Title Tenures c. 11.

In case of Personal property the owner
is not

3d Bone 4.3

3 Inst^s 134 is not allowed at Law to regain possession by
2 Inst^s 550 force, unless feloniously taken.

2 Inst^s 565-6 Provocation never justifies a battery, but may
1 Wilson, 6
Esp^r 317 mitigate damages.

5 Com 354 A Servant cannot justify a battery in de-
fence of his Master's Goods

Esp^r 310 Assault and Battery at different times
Case 828 cannot be laid with a continuando, nor "diversis"
3 Com 312 diebus et vicibus "For an assault is one entire
Inst^s 638-9 individual act."

For a battery of the Wife, the Husband and
Esp^r 310 Wife should join and the injury should be
1 Sidg^e 387 laid ad damnum ipsum. For the Husband
1 Rolle 782 is damaged by expense and cost of suing
Esp^r 1208 and the wife is mentally injured and the
damages would survive to her

Esp^r 310 If damages are laid "ad damnum" of
Esp^r 1208 the Husband only, the Judge may be directed

Esp^r 321 If the Parties are not Husband and Wife it
Arg^t 480 must be placed in abatement

Esp^r 310 If a battery has been committed agst
Esp^r 1208 Husband and Wife, he alone must sue for
1 Rolle 782 per 2 the injury to himself. * That if both join in
Case 555 this case for both batteries and several damages

* Esp^r 310 are ^{claimed} given the wife abates quoad the Husband af-
ter verdict * If joint damages, Judge is asked
ed in note

The Diff may lay in aggravation of
dam

damaged it is said many facts for which he Esp. 317
 could not himself recover. Eg affaulting his Tack 542
 servants. "Invid" Is it to aggravate damages
 or to show how enormous the trespass was? - Page 463.

Pleadings

In England a justification must be pleaded
 in case of a Battery. as "Son assault d'ennemi" Esp. 317
 for it cannot be given in evidence under the Co Litt 282
 Gen. Issue. So in other cases of trespasses
 when the Deft on the facts shown is "prima
facie a trespasser

But circumstances which attend the
 transaction. (as words spoken at the time Esp. 317
 tending to excite mutiny in the Deft's ship) 2 Wms 224
 may be proved in mitigation of damages
 tho' if pleaded they would have been a justification

If the Deft justifies an assault he Esp. 318
 must confess the battery. as the plea is ita Tack 537
 Eg plea that the Deft's horse run away with
 him agt his will - there is no battery by the
 Deft.

The general replication to a plea of Esp. 317
 "Son assault d'ennemi" is re injuria &c (which 1 Bac. 155
 is a denial of the Deft's plea of "Son assault") 5 Com 354

If the Deft pleads "Son assault" he Esp. 317
 tho' he can justify the assault he must deny Com. 288
 it specially. for he cannot give his justification
 in evidence under the Gen. replication "re injuria".

212 0375

Buller 13

Feb² 53

Feb. 20. 1857

Stam 350

Глинка 381

Exhib. 1730

1740
1740

3 1/2 16

27.22 - 10

5 Bar 205-4

1221. 138

2 Vols. 295.

Cartha 228.

107-2 104

220 31
 220 10

312-21 2 82

Feb 10 232

C. 5. 11. 283

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K.

de Bacon. 179.

1871

March 17

447

State of excuse may be either pleaded, or
given in evidence. As invited accident.

To the plea of "unallotted means" the Opp
may reply, "de son côté" (which I suppose
has included a denial of the justification) or
an "outrageous fallacy" altogether. The matter
must be

The Gift is not confined in proof to the term laid in the Declaration, he may have and better not be caused by the Gift of Limitations, How Success Gift must cover all the time; must be as broad as the Declaration.

And the D^r passed as to Crime and Sub-
sequent Crime when he already has a placet sermo &
it seems not for proof of the D^r a placet
on any point sufficient. The D^r is now to
a placet sermo of

So the plea should be as broad as the Declaration as to the subject matter. it should cover the whole injury. E.g. Of the Pte charged assault battery and wounding, a plea negating the battery and not the wounding, is ill.* "Son against demesne" covers the whole grievance: for the words are 'that the Pte made an assault &c. and that the Deft then and there defended himself, and if any damage or hurt, it shall stand &c.'+ Seems if negated means &c. (Supra) that does not answer the allegation of wounding In

In Justifications founded on the relations of Husband and Wife. Servant to the master he must be assumed to have been made to prevent injury to wife. Husband Matter is not by way of revenge. The wife can't plead alone. Husband must join in all cases. —

Esp^o 318

2 Ray 62nd

2 Robt 546

Hry^o 953Esp^o 318

60 Ta 239

A former recovery of damages agt. the Deft. on another. is a good plea in bar for the maintain damages. are reduced in rem pro vicatam which takes away the satisfaction is not necessary. M^o R^o reason that in case of Goods damages being maintained the P^o might multiply actions. from the hope of obtaining more. In case of Contracts the sum being certain he has no such in moment if the original Deft is solvent

60 Eliz 30

Esp^o 309

6 D. 426

Talt^o 41

60 Ta 734

Bacon 30

Hry^o 68

5 Bae 785

Horn 1142

Esp^o 319Talt^o 41

15

The rule holds even if further same age occurs after the first recovery. for the latter is the gist.

So in Writs generally a former recovery is a bar as to all Continued Writs committed to for the sale of the first writ

2 Robt 320

320

320

Esp^o 317

55 Ta 551

55 Ta 551

Esp^o 418Hob^t 60

60 Ta 239

60 Ta 239

60 Ta 239

60 Ta 239

60 Ta 239

60 Ta 239

60 Ta 239

Severing Damages

Esp. 321

D. 420

Barn 2790

Carr 19

Hoke 5

Tinkins 317

re 40

Geo. 118

Esp. 420

H. 422

Carr 19

Hoke 5

Barn 2790

Carr 19

Hoke 5

Tinkins 317

re 40

Geo. 118

Esp. 420

H. 422

Carr 19

Hoke 5

Barn 2790

Carr 19

Hoke 5

Tinkins 317

re 40

Geo. 118

Esp. 420

H. 422

Carr 19

Hoke 5

Barn 2790

Carr 19

Hoke 5

Tinkins 317

re 40

Geo. 118

Esp. 420

H. 422

Carr 19

As to severing Damages the Authorities are contradictory. These or more are charged jointly and are found jointly guilty i.e. each guilty of all the sum cannot sever the damages tho' they please Severally. It seems;

To if Judge goes agt. both by Default the damages cannot be severed.

If the Defs. sever in their Pleas. E.g. one Pleading the 1st Pled another a Justification the Jury may Sever tho' the several Defs. are supposed to be equally guilty according to Espinasse 420. 2 Ld. 1140. Contra. 118. Esp. 321. See 1 Sand. 207 up that the damages cannot be severed. 5 Barn 2792

But in the Cases where the damages are not to be severed the Plt. may prevent the Def. from arresting Judge, or taking Exec. by renouncing one a Plea and taking Judge for one only. There can be only one Ex. in these Cases. D. and Ex. may go only agt. the one agt. whom its amount was assessed. If the Plt. is ill enter a "Nolle Prosequi" as to the other; or without a "Nolle Prosequi" he may take Judge for the greater damages agt. both.

The Plt. may arrest Judge in these Cases if he so elects or he may enter a Nolle Prosequi as to one Def. and take Judge agt. the other for the one assessment.

It is said that the Jury may in fact find one guilty as to one husband and another as to another, and assess damages severally, and the finding will be good without a verdict.

(The Supposed to be the good effect). Then there are not found jointly guilty, must the different Defts are found guilty of different parts at different times. This qualification was adopted by our Court. *It in Middlesex County.*

Geo Cha^s 54 and Fuller 20 and with the *Woods 57* in this qualification. Therefore where the injury is one entire battery, the Jury cannot sever, because the wrong was indivisible.

The first rule is adopted in this State viz that if two be jointly charged, and found guilty jointly, i.e. each & the whole damages cannot be severed. *Danson vs Wheeler &c.* Sup^a Ct November adjourned Term 1798 and *Fuller 110* the Defts found severally not guilty. *Lord 85 Re^l 1480* is compelled to pay the whole, the Court as contribution in Law, or Equity.

In England it has been held that a "joinder" of parties or non suit as to one of several Defts. before judgment, against the others discharges the action as to all. It operates as a release to the one.

The practice is otherwise in CONN. and is not now considered as Law in England.

and in England and Conn. the Ct will give.

Hob ^t	70
2 ^d	180
Fuller	20
Back	19
Geo ^a	173
Dillon	170
10 th 2 ^d 12	
3 ^d 12 th	511
1 st 12 th	90
Dillon	300
Back	500
Back	49

Buller 385 gives the Plff. leave to strike the name of one and
 2 Buller 287 and improve him as a traitor. The rule is
 1 Leigh 441. when the other Def'ts wish for his evidence if
 Landon 88 there is no evidence ag't him he may be sworn
 1 Wilson. sup But if any at all it is otherwise - he must then
 be sworn before he can testify. The Ct may set
 a verdict as to him he first taken

5526, 5551 All causes of action arising, "ex delicto"
 whether disrupt or case, be the remedy and remedy

2 Buller 184. The Jury may if they please say from the
 Declaration, and find only a fault. This is a
 1 Crooke 39 rule common to actions of trespass in general
 6 D - 54 of goods of the battery, and not of the trespassing.

Finding more than is in issue is void. If
 there has been a mayhem, the Ct may on view
 increase the damages at their discretion. And
 2 Latib 223 the no mayhem is expressly laid in the Decla-
 30 Hen 332a ration. (they may increase &c) if the judge
 1 Leigh 109 certifies on repleas it. But it must be done
 1 Wilson, 5 in Bank. (it cannot be done by a judge of
 "Nisi Prius") - the Plff must be present when
 motion to increase is made. This is founded
 on the rule that in an appeal of mayhem
 "mayhem or not" is to be tried by inspection
 & must be proved to be the same hurt for
 which the damages were given by the Jury.

2 Buller 322 So damages are increased at super in case of

of wounding. So of atrocious battery. The manner of wounding must be laid in the Declaration. *Edw Ray 1760*
3 Hen 333

Damages are not increased in these cases. *Est 332*
if the Judge who tried the cause declares himself *Wilm. 5*
satisfied with the verdict

The Jury cannot give more damages than are laid. But if they do the Plaintiff may have *Est 420*
by on remitting the excess. *Co. L. 297.*
Carth. 216
1060 1186
1764 11043
423 25-67

Every Assault and Battery is a public as well as private wrong, and punished by fine and imprisonment. See Title "Public Wrongs". *1 Bac. 150*
1764 134
3 Hen. 121
4 D. 145
D. 210
Stout 336-7

Secret assault is a distinct offence under our Stat. Both remedy is distinct from that in other assaults. Several may be joined when the Secret assault is by several. * The person who is secretly beaten means by our Stat. that he is beaten by a Justice of the Peace, or other Magistrate and making oath of the battery, and the person who committed it, have a forthwith process and the Justice he will bind him over to the next Ct. *Stout 338*
** Trial 108*

Action of Trespass "vi et armis" for False Imprisonment,

Every unlawful restraint of one's liberty, or
rather every violation of one's right of free motion
is false imprisonment. E.g. illegal confinement
in a private house, in the street &c.

3 B. & M. 127
Esp. C. 325
2 Inst. 589
5 B. & C. 169
Fench 262

(It follows therefore from the definition of
false imprisonment that there are two requi-
sites, essential to the constitution of this wrong,
viz. 1st Detention of the person. 2nd The
unlawfulness of the detention.

3 B. & M. 127
2 Inst. 589
5 B. & C. 169
Fench 262

The unlawfulness consists in want of
authority. Authority may arise from legal pro-
cess, or from special cause amounting from
the necessity of the case to a justification. As
the arresting of a felon by a private person.

Exp. C. 333
Fench 262
3 B. & M. 127
Esp. C. 334

It lies not for the crew of a ship captured as
prize, tho' the prizes be no prize. Situations.

Doug. 572

But every arrest of a person for a civil
cause without legal process is an unlawful
arrest. A custom to imprison without le-
gal process is not good.

5 B. & C. 169
2 Inst. 512
5 B. & C. 169
3 Inst. 147

A private person is not guilty of false
imprisonment, by confining a person arrested
by a police officer at the request of the
officer.

5 B. & C. 169
Fench 262
3 B. & C. 551

It has been decided that an officer having made
 18 B. & P. 24 arrest on a writ of habeas corpus cannot delegate his
 right of custody in his own absence.

The most common cases are those of
 arrests under writs of habeas corpus (But the rules in
 the Books relative to this particular are not
 precise, but in some cases even contradictory.)

Of the liability of Courts

2d. 320 A Ch. of Record is guilty of corrupt practices (as
 Lach. 390 imprisoning this male) & the Judge is not li-
 able to an action if he acts judicially and
 15 B. & P. 503-13-14 within his jurisdiction.
 D. 534-5
 2d. B. & P. 1141

2d. 320 In England a Judge of a Ch. of Record of
 12 B. & P. 23-4 general jurisdiction, it seems is not liable for
 Lach. 390 any judicial act, whether it happens this male
 15 B. & P. 503-34 take or male, if he confines himself to his
 535-7-8-13-14 proper jurisdiction. No proof in this case can
 2d. B. & P. 1141 be admitted agt. this "actement and violent punishment"
 shown the "non" in favour of the Judges integrity.

But it seems if a Ch. of Record of even
 * 10 B. & P. 76 general jurisdiction, has not jurisdiction as to
 14 B. & P. 86 the subject matters, the Judges are liable, for
 D. 59 here they do not act judicially. But if they have
 jurisdiction of the subject, and in their pro-
 * 10 B. & P. 76 ceedings transgress their jurisdiction, they are
 2d. B. & P. 1145 not liable (it seems) Quia E. & G. awarding a
 Lach. 390 "capital" agt. a person in a civil case. (Ch.

Cts of limited Jurisdiction. (tho of record) it seems and liable if they transgress their jurisdiction even by mistake.

Aliter if they do not exceed their jurisdiction they are not liable for malicious acts if they do not exceed their jurisdiction they being officers

Of not of Record (as Justices of the Peace in England) are liable at Com Law for any mistakes of Jdgs. (Quere unless they transgress their jurisdiction in some respect. 2 B.R. Rep. 1145)

But this rule is mitigated by several Stat.

But the Ct. of B.R. will not grant an annulment agt. a Justice who appears to have acted uprightly. In Com^d Justices of Peace and Cts of Record.

Courts which can hear and inquire and are said to be Cts of Record. This is said to be universally true. 2 B.R. Rep. 1146

Corruptness on the Estate of an insolvent debtor, and not a Ct of Record in Com^d. There is no appeal from their decision as a Court.

Of persons exempt from Arrest

Arresting an Ex^r or Adm^r for the Debts of the Debtor he is unlawful except on a suggestion of devastations. Even imprisonment in this case agt. the Ex^r as well as the original Debt. And the rule is general that an

5 B.R. Rep. 412
2 B.R. Rep. 1145
2 B.R. Rep. 454
1 B.R. Rep. 390
Hug. 993
Esp. 331
8 Coke 114
2 B.R. Rep. 1145
Esp. 320
Talk. 390
Hug. 710
8 Coke 280
2 B.R. Rep. 394
1 B.R. Rep. 354
15 B.R. Rep. 536
Esp. 339
Burr 598
Esp. 338

15 B.R. Rep. 658
2 B.R. Rep. 407
Talk. 200
Burr. 491
3 B.R. Rep. 23
12 B.R. Rep. 380

Esp. 320
3 W. Rep. 368
2 B.R. Rep. 1192

3 Wilson 345 an Att^y who is instrumental in causing an ill-
 legal arrest is liable with the principal

In this case I apprehend the Officer would
 not be liable, the subject matter being con-
 siderable by and persons being amenable to the
 Ct. (and the cause of action having arisen within
 its local limits) provided the Officer has
jurisdiction.

Exceptions from arrest on some
 times in England connected with the character
 of the individual as Ex. Supra. Sometimes it
 arises from temporary circumstances or particular
privilege. As attendance on Ct. as a
juror, or testimony &c. (The privilege of a Juror
 extends to his House money and manumission)

In the latter case the arrest is not illegal
 in the first instance, but a subsequent excess
 after which detention is illegal and action lies
 there against the Officer or the Parties only 2 agst the
Party and Officer I conclude

(What is said by Justice Buller, Doug⁴⁵ 652
 must relate to an action after the subse-
quent, for the first detention in case of a Prisoner)

In Corn a writ of protection is com-
 monly obtained in these cases. This is as a
superior in England. Arresting and re-
leased is then also imprisonment

The writ in these cases is good and the
 Suit continues. Arresting

Arresting a Person on Certified Bankrupt Decree does not under the Officer liable. he is bound to obey the writ. The party may be liable in "Case" Quere in Case of Distress? +

Dang. 640
D.D. 850
10 Coke 70
28 D.R. 231
Esp. 530
Magnum
Pantheon

The privilege of Suits is disallowed in case of Collusion. So in vexatious actions, it being discretionary with the Ct. to allow or not

28 D.R. 1193
Cock. 9
14 C. 630
11 Mod. 79

So when a party attends as a volunteer upon business or with a view of answering pro cess. when there is none

A party attending Arbitration under a rule of Ct. comes within the exemption.

A Gaoler detaining a prisoner for fees tho otherwise entitled to discharge must pay imprisonment. Same Law in Conn. "Secus" as to bond I suppose Root 158.

If the order of Ct. is to confine one in a certain prison. Confining in any other is false imprisonment.

5 Bac. 171
Salk. 408
5 Mod. 295
3 Salk. 219

A private Officer is justified in arrest- ing without warrant on a reasonable charge of Felony, tho no Felony is committed. "Secus" of a private person. But

Dang. 334
D.D. 345
4 Bac. 57
R. 43

If a Felony has been actually comm- mitted a private person suspecting another to be guilty on reasonable ground and without malice is not liable for arresting without war- rant in any before a Magistrate. So

Esp. 334-5
5 Bac. 171
14 D.R. 150
2 D.R. 82
Dang. 345
R. 56

10 Rest. 150
28 Hawk. 82.
Esp. 334.
Dang. 345.

Exp. 327
60. 508

5 Hawk. 95

Sack. 78

2 Hawk. 111

4 Hawk. 150

1 Hawk. 255.

2 Hawk. 1195.

2 Hawk. 72

2 Hawk. 1273

Sack. 120

3 Sack. 148.

Exp. 505

So to prevent a breach of the Peace or Escape
"Seems" if no felony has been committed

An original arrest on Sunday in Civil
Caus. (being void by Stat. 29 Ch. 2 & 370)
is false imprisonment. Such an arrest is
good at C. Law.

But Bail may take their principal on
Sunday. (Hobson) Contra as to bail to the Sheriff,
for he is in nature of a Gaoler, and the principal
paid as a prisoner, and the taking by bail is
taking on an escape. Such an arrest under
an escape warrant is lawful. Quen 2 Hawk. 1273

5 Hawk. 93
Caus. 1
Hawk. 62
2 Hawk. 307
2 Hawk. 489
See Sheriff's Re

Arrest in Civil Caus. by breaking open
doors of the Deft's house is false imprisonment
"Seems" if inner doors.

Caus. 19.
Exp. 654-5
Civ. Caus. 908
Hawk. 383.

It has been questioned whether if an ar-
rest is made by illegally breaking the House,
the Execution of the process is good, and the
only remedy by a Show. or whether the Execution
itself is void and may be set aside in a Sum-
mary way by discharging the person arrested.
It was not decided in Caus. and Exp. which was
a case of breaking doors. & there said the Ct. in
summary is discretionary.

2 Hawk. 307.
Exp. 285-6
5 Hawk. 93.

It has been since decided that the Ex-
ecution of the process was void in case of a Show
only taken by breaking a door and Ct. set-
aside. In the

In the last case false imprisonment is in case of breaking doors. It is different from the Hobart 62 case of a sailor, (in the latter on account of the knowledge of the party. In the former case the arrest is ab initio illegal).

It is also questioned whether if an illegal arrest is made, in consequence of which another arrest is made which would otherwise be good, the latter is valid? It is valid unless there has been some collusion. Aliter if there is collusion, it seems.

It has been decided that an officer by an escape warrant may retake his prisoner in another state. The warrant however is of no use as to bail prised from another state, see —

If an officer by mistake arrests B. instead of A. he is liable for false imprisonment. So even if B. binds himself to lie at A. Quere. as to mitigation of damages. Esp. 328.

In conspicuous the Defts body, and mesne or final process, in civil cases when sufficient personal protection is tendered, is false imprisonment, for the process is agt. both.

Any person has a right to arrest another who is fighting, and restrain him until his passion is over.

In certain cases, Tornet Court tho' liable to be sued with their husbands, cannot be taken under arrest on mesne process. But there is no

2 B. Rep. 823

1 Root 107

5 B. Rep. 172

Dang. 42

2 B. Rep. 552

Esp. 328

3 Com. 490-3

2 B. Rep. 582

Moore 457

Haid. 323

1 Root 120

2 Swift 191

5 B. Rep. 171

5 B. Rep. 171

1 Hawk 1307

242 81

2 B. Rep. 1272

1 B. Rep. 480

2 B. Rep. 720

Salk^r. 115 instance of false imprisonment laid, in these
2 H. Bl. 17. cases. Doug^r. 648, argued. Can it be but 3^d seen

2 B. & P. 1193-4 In the last case of Tynes Court; no action
analogous
Doug^r. 648 I conceived would lie, the process is legal tho' the Ser-
vice is sometimes set aside, and the Tyne discharged,
the original arrest is not illegal.

5 Bae. 172 Arresting and confining one for a short
Roach 160 time, under a process warrant from a Justice
Moore 408 for examination is not illegal
Cullen 829

A private person may without warrant
5 Bae 172 confine a person disordered in mind and who
appears disposed to do mischief.

Of the liability of Officers

Est^r. 391 If an Officer makes an arrest on a process
Bulmer 823 from the face of which it appears that the Off-
Hend 480 icer has no jurisdiction he is liable according
Est^r. 230 to the extent of authority, from whatever cause
Cullen 230 the defect of jurisdiction arises

But the rule has been extended further.
Thus, it has been held (without any regard to the
defects appearing on the face of the process or not,
that when a Ct of limited jurisdiction has not
jurisdiction of the cause, (from whatever granted
10 Coke 767 the defect of jurisdiction arises) the Officer is
liability. The decision and reasoning in the
Marshall's Case. - contradicted in * Coke is
supported, in 2 Wilm 380 56, Est^r. 398-9. The

* 10 Coke 767
Lew. 314
Est^r. 337
* Est^r. 230
Fry 710
W. 993. 509.

The decision in the Marshalled Case seems to be still law in England. & of that when the Ct. issuing the process has no jurisdiction of the Subject matter, every thing done under it is absolutely void. Steth 710. as it appears on such on the face. 1 Schog 046.

But where the Ct. tho' of limited jurisdiction has jurisdiction of the Subject matter, and the defect of the jurisdiction is from something local & personal, the Officer is justified unless the defect appears upon the face of the process. Steg, 710. and according to Ed Ray 2301. and Cawood 30 he is not liable even in this case, because the original Deft ought to have pleaded it at the end of Conn. mon. 704. 3 Wilson 345 Est. 229, 2 Hebe 708. 8410 2 Wilson 384. 3 Hebe 213. 6 Coke 54.

An Officer may justify under command of the Ct. of Westminster. Hebe tho' the writ be void except when the Ct. has not jurisdiction of the Subject matter.

In Conn an Officer is justified in all cases unless the process is void upon the face of it. (When the jurisdiction is complete & the process is malicious and unfounded the Officer is justified tho' the Just. Magistrate or the Court may be liable.) When the Ct. having jurisdiction of the cause issued erroneously or improperly still the process appears regular the Officer is justified.

Est. 391
Bulmer 82-3
1 Kent 333-4
Cawood 172
Hebe 488
Steg 710
Bulmer 82-3
Cawood 20
5 Bulmer 170
2 Hebe 190
1 Kent 369
Bulmer 82-3
Cawood 274
2 Hebe 29
3 Bulmer 233
Est. 391
Hebe 488
Bulmer 83
10 Coke 70a
6 Coke 54
10 Coke 70
6 Coke 54
3 Wilson 345
Hebe 410
D. L. 182
2 Smith 387
2 Hebe 231
Steg 710
Steg 710
2 Hebe 231
7 D. 453
3 Bulmer 333
2 Hebe 488-9
3 Wilson 345

The rule seems to be in England according to the weight of authority that when the subject-matter is out of the Old jurisdiction whether the jurisdiction is general or limited ne cessit is said and the Office is liable. "Aliter" when the want of jurisdiction is as to the person or place then the Office is not liable unless it appears from the process, nor then in case of County or Westminster. But the latter branch of the rule the true of ne cessit process applies not it is said to seize process (issued by inferior Offs) without qualification. EQ when a writ is issued or seize process of inferior Off the Officer justification must show that the cause arose within the jurisdiction or at least that it was so laid.

But tho' the process under this qualification justifies the Officer, it does not the original Off. He is bound to know the extent of the Old jurisdiction, and to show it and when the cause of action arose. And the original Offt. (now Offt.) is not bound by having been bound to the first action. In Ex Reg 230 it is said that even the original Offt. is liable in this case. So what "Ex Reg 230, 156, 1 Kent 230" are cited. See Cowper 20. Ex Reg 230 is approved in this point in CONN by Lane & Ellis Offs.

In some cases process is said, and the party and the Officer when the jurisdiction is

of the Ct over the cause is complete, as to Subject
material Person and Place

1st In cases of limited jurisdiction. Eg
where an authority given by Stat. is not strictly
by pursued. When a Justice committed the
Jy for killing game tho he had sufficient facts
to answer the Jy. - the Jy. was excused
- but the illegality of the warrant was not patent

* Est. 331-7
8 Coke 114
Salk. 408
18 Reg. 710
* Wilton 153
Est. 33256

When a person was convicted on a Stat.
penalty of 13s which he offered to pay but was
imprisoned by the Constable until he paid the
fines which the Stat. did not allow. Here
the Constable was Def. This was for abuse of
process. There was no question of jurisdiction. So
ag. the Commissioner of a Bankrupt for any com-
mitment not warranted by the Statute Law.

Est. 331
2 B. & P. 1035
D. 1141

2nd So in other cases the process of even the
Ct of Westminster. or any Ct, aside from any
objection to the jurisdiction of the Ct is called
good, and the Jy in the process liable to that
action. Any reason of some irregularity. Eg a
caption returned the next term but one to
that of the return. The Jy is not liable in
this case if the process is from the Ct of West-
minster, and tho the irregularity appears on
the face. The same is probably the rule in Conv. Div.

Est. 328-9
3 Coke 491
3 Wilton 341.5
2 B. & P. 845
Salk. 700
Rook 315

* Wilton 345

3rd So tho the original arrest were lawful, yet
in any subsequent apprehension, this action lies ag.
the Jy, or the magistrate if he is in fault

Est. 332
15 Reg. 536
Eg

EG warrant Cruelly in Conspiring in a Surgeon
without a Warrant cited 1800 530 commitment by
a military command: jurisdiction of Magistrate
held also Sherrin.

Arg. 1005

35 Feb 530

40 360

Relic Nov 485

When an Officer justifies proof that he
acted as an Officer is sufficient as to that fact
He is not bound to show his appointment. Quere
may not this be rebutted?

Of Irregular Proceedings

Est. 320

W. 341

3 East 128

1 Arg. 509

10 May 73

10 June 98

10 June 272

10 June 185

Est. 391

1 Wilson 345

2 Arg 993-4

2 Arg 993-4

2 Arg 993-4

2 Arg 993-4

2 Arg 993-4

2 Arg 993-4

2 Arg 993-4

2 Arg 993-4

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2 Arg 993-4

2 Arg 993-4

2 Arg 993-4

2 Arg 993-4

2 Arg 993-4

2 Arg 993-4

2 Arg 993-4

General Rule. An arrest under an irregu-
lar process is void. So under a process of arrest
founded on an irregular proceeding EG arrest
on an Ex. issued on a Judge's order for irregu-
larity. It is said that the Officer serving the
process is not liable. (as in case of Courts of
Westminster. True if the Ex. is of limited juris-
diction and the irregularity appears.

2 Arg 450

2 Arg 509

3 Wilson 345

Est. 391

3 Wilson 345

3 Wilson 345

3 Wilson 345

3 Wilson 345

3 Wilson 345

3 Wilson 345

3 Wilson 345

3 Wilson 345

3 Wilson 345

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3 Wilson 345

3 Wilson 345

3 Wilson 345

3 Wilson 345

3 Wilson 345

3 Wilson 345

But an arrest on an erroneous process is
good. Therefore the party may justify under an
erroneous process till it be reversed.

Arg. 320

2 Wilson 47

2 Wilson 47

2 Wilson 47

2 Wilson 47

2 Wilson 47

2 Wilson 47

2 Wilson 47

2 Wilson 47

2 Wilson 47

2 Wilson 47

2 Wilson 47

2 Wilson 47

2 Wilson 47

Process has been holden irregular and void
when filed up without proper authority EG
return in England the under Sheriff left a blank
for the Atty. to fill with the name of a Bailiff.
The person sued here was the person serving the
process. It does not appear that he knew of the
irregularity. (Inferred authority is not sufficient to warrant
Law in Conn. see Stat. 24. 387. A

Arrestabates when directed to an indicted
out person must be named in writ by the
Magistrate. So a writ drawn by a Sheriff ex-
cept in this case.

So where the process has issued informally
as process out of the Vice Chancellors of Oxford, Esp. 329
Aug. 993
(Custom) original Plaintiff making oath of his cause
of action, and that he believes to be true that he
suspects De. The Party, Officer and Gate were
liable, all joining in one plea. Morgan adds
the Officer and Gate might have justified. This
is said in 2 W. & A. 385 and the whole said take
care now judge

(The meaning of the above is this according to
Judge Reed, "The Chancellor of Oxford has power to
hold a Ct. by Stat. for the benefit of the students.

The Stat. requires that the person who sues in
this Ct. shall come and swear before the Chan-
cellor, that he believes a certain thing to have been
done, (as e.g. property stolen), and then this
is done the Chancellor can't issue his warrant.

The party swore he "suspected" De. and the Chancellor
issued his warrant, and on an action brought against the
party, the Chancellor, Officer and Gate, for false in-
formation they were all held liable; they joined
in the good plea. But says the judge that the Officer
and Gate justified. They would have been
sworn as the defect did not appear on the face of the
process.)

So where

Esp. 330

Law 314

Wren 262

2 Rest. 30

Hod. 81

Carter 21

Hod. 58

Carter 21

Hod. 58

Carter 21

Hod. 58

Carter 21

Hod. 58

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Hod. 58

Carter 21

Hod. 58

Carter 21

Hod. 58

Carter 21

Hod. 58

Carter 21

Hod. 58

Carter 21

Hod. 58

To which the writ is not returnable on a day
 certain. It is irregular. "Eg at the next Ct of the
 County"

But this need apply only to return of
 writs and has never been shown even in case of
 writs of return of process, and "next Ct" is not sufficient

"Next Ct" is not sufficient. The Sheriff and County Officers
 have stated the law established by general Law

Search Warrants

Esp. 399

Hod. 150

Wren 262

2 Rest. 30

Hod. 81

Carter 21

Hod. 58

Carter 21

Hod. 58

Carter 21

Hod. 58

Carter 21

Hod. 58

Carter 21

Hod. 58

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Hod. 58

Carter 21

Hod. 58

Carter 21

Hod. 58

Carter 21

Hod. 58

Carter 21

Hod. 58

Arrests under general Search Warrants are
 illegal. No general Warrants of any kind
 are now in use to arrest "the authors of a Libel"
 shown they are

The requisites to Search Warrants are 4th
 1st That they be granted on oath. 2nd The grounds
 of suspicion declared. 3rd Executed in the
 day time by a known Officer and in the presence
 of the informant. 4th Directed to a fixed
 time and place. (Cf. the particular person in
 whose possession they are)

Esp. 399

Hod. 150

Wren 262

2 Rest. 30

Hod. 81

Carter 21

Hod. 58

Carter 21

Hod. 58

Carter 21

Hod. 58

Carter 21

Hod. 58

Carter 21

Hod. 58

Carter 21

Hod. 58

Carter 21

Hod. 58

When the requisites are observed the person
 is justified in not by the event

When the Officer serving a process justifies
 under it, he need show only the writ or pro-
 cess itself, and that it is returned if a return
 process, and the return day has arrived

In England the Sheriff under Office is
 not obliged to show the return because it is not

not in his power. But the necessity of the Op 460e 57
feins shewing a return obtains only in case of Wilson 17
mesne process

But if the original Poff is Def, he must Est. 333
show a Judg, as well as Ex in case of Process for 42ack 408-9
cess for Judg may have been reversed before the
arrest and the Poff (original) ought to have notice of it

The same in the case where the action is
against a mere Stranger who procures the service 42ack 408-9
of Process for another. Seems if he acts in aid
of the Officer and at his request.

If a Sheriff does not return a writ — 5Comm 581
where he ought to do so (or makes a false re- 2Rae 503
turn), he may be treated as a Trespasser "as in 5Bac 102
his" tho' this is more a consequence for the return 2Ack 409
is necessary to complete and validate the act 20Ray 532

If the original Poff and Officer are sued together Est. 336
they may sever in defending and if they join and the plea Str. 1184
of justification is insufficient for the Poff it so for the 2509 993
Officer. So it concludes if the plea is not good for the Officer Est. 336
and would be for the original Poff he loses his defence Str. 1184
by joining. Off must show the return of the process 1Wilson 17
when he ought to do so.

Disarming, Commanding, aiding, and assisting Co.D.P. 54
one a Trespasser 12ack 409
servant keeping a key of a 250ack 512
room. knowing one is imprisoned in it is guilty of false 3Wilson 378
imprisonment. 1Comm 549
Co.D.P. 54

Disarming even a foreign prisoner 2Poff 983
leads to imprisonment and false imprisonment in the 21 4055
prisoner.

Action on the Case for Malicious Prosecution

This action is to recover damages agt^d one who has injured an individual, or other person, or taken action agt^d the P^rty, from a complaint (i.e. malice) without any ground or probable cause.

It is analogous to the old action of Conspiracy, which is now much out of use. Conspiracy lies only agt^d two or more for having felicitly and maliciously prosecuted the P^rty for Treason, or Felony, and thus endangered his Rep.

Another analogous case is the action on the Case in nature of a Conspiracy.

Action on the Case in nature of a Conspiracy lies where two or more conspire to injure another maliciously and without cause, & otherwise conspire to injure him in person, - fame, or property.

The gravamen in action for malicious prosecution resembles in some measure that of Slander. It is not sufficient, or generally the damage to which the P^rty has been exposed, but the vexation, expense, and scandal.

The action of Conspiracy lies not unless the P^rty has been actually prosecuted, and acquitted, for so and the record of the result.

12 B. 115

12 B. 115

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12 B. 115

An Indictment for Conspiracy lies where there

2 Levin 51 has been manifest conspiracy at about the time
 9 Cook 50
 Est. 530 thing is executed. So an action on the case in
 1322 81 nature of a conspiracy lies where Indictment
 10 Bull 112 It has been actually exhibited in Superior Chan-
 1 Com. 158
 20 a 225 giving a quere by conspiracy - injury to reputation

Est. 530 So the difference between an action of Con-
 2 Ray 379 spiracy and an action on the case in nature of
 1 Com. 154 a conspiracy is that in the former if all but
 2 Bull 14 one are acquitted Jdg. cannot go agt. him. -
 1 Wilson 240
 2 Levin 52 In the latter Jdg. may go agt. one only.

Wile 1112 p. 5 The first is a joined writ in the 2d case 530.
 2 Ray 176 The latter is a several action on the case. In the
 5 Mod. 408
 5 Mod. 169
 60 Ch. 239

Carl 416 For over the danger to think the conspiracy ex-
 30 Ben 1267 posed the 1st is the joint - in the latter it is the
 2 Bull 14 consequent damage & scandal to the case for
 10 Mod. 219 malicious prosecution
 1 Ray 591
 1 Dan. 230

The action on the case in nature of a
 conspiracy is substantially an action for mal-
 icious prosecution with this difference viz that

2 Bull 14 the latter may be brought agt. one no other being
 1 Com. 158 concerned. - The former must be brought agt. two
 Est. 531 or more or agt. one alleging that he with
 2 Levin 52 another or others had conspired to the ground
 60 Ch. 173 of the two actions and therefore the same. And
 20 a 239 the two are several Jdg. may go agt. one only.
 1112 p. 5
 1 Wilson 240
 1 Dan. 230
 2 Ray 176
 5 Mod. 408

The action of conspiracy (2 Bull 14 Carl 416)

30 Ben 1267 on the case in nature of a conspiracy and for

malicious prosecution were all unknown to Goddard
 They first originated in the reign of Edward 1st were
 framed by his direction but sanctioned by Parliam^{ent}
 ment. The two latter and devised I suppose from
 the Equity of the Stat of Westminster 2^d

It is essential to the support of this ac-
 tion i.e. for malicious prosecution, that malice
 and want of probable cause in the former
 prosecution should have concurred. Malice
 what is false alone is not sufficient. A lib
 "e.g." agt. one who maliciously promotes a false
 prosecution agt. another, knowing the charge to be
 false, or having no reasonable ground to believe
 them true. But it is always sufficient for the Def^t
 to show probable cause whether he acted with
 malice or not.

In Conn when the action is for a
 false and malicious Civil Suit it is called
 a Verbalious Lawsuit. This division will be
 pursued. (in the Conn distinction will be observed)

II Of Criminal Prosecution of false & malicious

If a man is falsely and maliciously indicted
 for a crime that would injure his reputation
 he may have this action. So if the charge ex-
 posed to danger his life or liberty. So an indict-
 ment false & subjecting to expense only is suf-
 ficient to support this action. E.g. a Husband
 sued alone for expense incurred on a malicious
 prosecution of his Wife - action lost.

2011. 239
 D^o - 328
 36 D^o - 127

2 Levins 30

Bacon 14
 Est^e 529
 48 B^o 1971
 15 R^o 544-5

Bacon 14
 Est^e 533
 60 C^o 900

* 1 D^o 15
 140
 Salk^o 14.
 * Salk^o 15
 378
 Salk^o 15
 379
 Est^e 529
 977

Exam

Examples showing that danger to the life or
 Est. 528, liberty, and not necessary. The indictments having
 45 Rep 248, been ind. so that the P^r was in no danger of
 36 Bore 127
 Salk. 45, a conviction is no answer to the action if the
 16 Bore 51 charge injures his reputation and honour & ex-
 penses are sufficient.

Est. 528 So if the indictment in the last case
 Cro. Jac. 490, has not been found by the Grand Jury yet the
 Salk. 14 action lies for the vexation, expense & scandal.

Salk. 15 So expenses alone caused by indictment in
 36 Bore 127 indictment will support the action & Cro. Jac.
 10. 148. indictment for exercising a trade without licence
 D. 114 the reputation of the party is not injured
 10. 148. 2. 3. 137 nor his personal honor endangered.
 16 Bore 51
 Est. 528
 24 Rep 277
 Salk. 14. 18

Public Officers concerning prosecutions
 1 Leon. 187 false information are not liable; but the
 Cro. Jac. 130
 25 Rep 231. for giving the false information knowing it
 16 Bore 51, to be false or without probable cause, is liable.

Cawfer 161 But if a Public Officer without informa-
 16 Bore 61 tion, and of his own mere motion maliciously (or
 25 Rep 231, fraudulently) prosecutes another he is liable. And the Officer acts
 D. 225 ministerially.
 Cro. Jac. 130

But if the Public Officer in the last case
 25 Rep 231 is the Magistrate granting the warrant and the
 Est. 530 governmen is that the P^r was arrested under it
 Darg. 650 detention not capture is the proper remedy. And in this
 without the case in Cro. Jac. 130 is denied.

It must always appear from the Declaration that the prosecution for which he is in some way at an end. The Courtiers "legitimo modo acquittatus, manifestate ante." That the Deft was discharged from prison is not sufficient. (because notwithstanding the prosecution may be still pending)

But the omission to show that the prosecution is at an end, is cured by verdict. (therefore advantage can be taken of it only by Special demand)

An allegation that the Deft was acquitted, on the original prosecution, is not supported by evidence of a non pros for this is not an acquittal. The declaration states all the proceedings in the original prosecution, and any misrecital in a material part of the indictment is fatal. A variance between the original record and declaration as to the day of acquittal. Seem if it is an immaterial part.

It seems that no civil action lies against Judges, Clerks, Jurors, Grandjurors &c for even malicious acts done in the exercise of their judicial power.

Malice may be and generally is inferred from the want of probable cause. But want of probable cause can't be inferred from the want of express malice.

To fraud vitiate the Deft may give in evidence collateral circumstances, as an admission by the Deft that the indictment was found &c

globe 50
Dang. 203
W. Med. 209
25 Rep. 231
Hobart 257.
1 Str. 114.

1 Sand. 228.
Esp. 532

Bulwer 14
Esp. 536
Falk. 21
Oleary 251.

Esp. 532-3
45 Rep. 590
Oleary 210

Esp. 532
25 Rep. 1050

Geo. R. 130
H. M. 158
Esp. 535
15 Rep. 503, 13
514, 34-5, 7-8
Crown 101, 172
18 Cr. 141
25 Rep. 528
23 L. Rep. 1141
12 Coke 334
2 Mod. 219

4 B. 1974
15 Rep. 544
Esp. 529.

Exp. 535
Str. 691

Crim. 520
 1 Wilm. 332
 1 Co. 207
 1 Mod. 262
 Conviction of the Def^t in the original "prose-
 sution by a competent jurisdiction is conclusive
 evidence of probable Cause.

Regent. is in most cases presumptive
 Crim. 520. but never more than presumptive evidence of
 1 Wilm. 332 the want of probable Cause. But being presumptive
 evidence it throws the onus on the Def^t to
 prove probable Cause in most cases.

4th Rep. 247
 1 Ark. 15, 16, 8.
 So an indictment upon a defect in the original
 "prose" is presumptive evidence of want
 of probable Cause. i. e. in most cases "not safe".
 But "good" whether or not found is "prima
 facie" evidence of want of probable Cause.

Regent. is not always prima facie evi-
 dence of want of probable Cause. E. g. 1 Wilm.
 Crim. 530. The case was bound over by a C. of Enquiry on the
 1 Wilm. 332 bill of indictment has been found by a Grand
 Juror. 15. In such cases generally lies on the Def^t who
 acquitted on the trial, the presumption being
 in favour of the complainant, i. e. Def^t.
 1 Wilm. 332. So if it appears from the report of the Judge that
 Crim. 529-0 there was probable Cause.

But when the facts lie in the hands
 1 Wilm. 332 of the Def^t himself he must then probable
 Crim. 530 Cause. The Grand Jury have found the in-
 dictment E. g. "prosecution for robbing the Def^t".

1 Wilm. 332. And proof of the evidence given before the
 Crim. 534, 535 Grand Jury is good evidence of probable Cause.
 1 Mod. 262, and

and the Deft calls at the original trial, as to
the existence of the crime charged is admitted. Suppose
that, if no other person was present at the time,
e.g. "not sufficient" of presumption for robbing the Deft

The existence of probable cause is a mixed
question, partly of fact and partly of Law. What
amounts to probable cause is a question of Law. D^o - 519
Bullen 114
Esp^r 539
Whether the circumstances alleged to
show probable cause and true is a question of
fact: but the fact being given, the inference is a
conclusion of Law

Therefore, regularly the Deft. Plea should
show the ground of suspicion, on which he acted, Geo. Clin 134
Esp^r 533

So it seems unnecessary for the Deft. to
show that the crime for which he was arrested
was committed. Secus (it seems, then) can
be no probable cause. E.g. the Deft. believes
his property to be stolen when it is not. Esp^r 534
Bullen 210
Clinton 48
Hoskins
2 Hawk 120

So what amounts to malice (or the exist- 22d Reg 1493
ence of malice the facts being given), is a ques- 13d Reg 519
tion of Law. ergatis v. g.
Wilson 233

When the action is for a malicious
prosecution for felonies, a copy of the record grant-
ed by the Ct. in which the trial was is must. + Edin^c 534
say, and the granting is discretionary. + RR 385
When the
crime charged is a misdemeanor only such copy
is not necessary, the original produced by the
Clerk is sufficient. + RR 385
III

II When the action lies on a ground of civil suit it is called a Verbalious Land Suit

The general rule as laid down is that the
Bulwer 11 action does not lie for bringing a civil suit even
Salk 13, 14
Coke 525 the there is no right of action because it is a
H. B. P. 215 claim of right. The Df is a verbalious claim
claim, and is liable for cost. So there is no
damage presumed. Sues for circumstances
For this rule there are the following exceptions

2d 526 1st When there is good cause of action in
Bulwer 12 a case of one and another having no another
Salk 14 by suit and arrests the debtor the action lies.

2nd When the Df on the original suit has
Salk 14 being good cause of action sued in a case and the
Coke 526 being cognizant of the action lies. But it is in
Bulwer 12 explained that the Df (the original Df) should
2 Wilson 312 have known that the Ct had not cognizant

2 Wilson 305 3rd If a person having no right of action, nor
H. B. P. 388 colour of right, and proceeding it to be so sued
H. B. P. 129 another for the purpose of vexation, he is
3 East 314 now liable, there are no such cases in the old books.

H. B. P. 228, 4th So if for such purpose he sued him for a
Coke 525-6 much greater sum than is due. But it is
H. B. P. 424 said that the action will not lie in the last
Coke 526 case for any sum if the Df has been had
Bulwer 12 over to express Df

When

When the suit is utterly groundless and known
to be so by the original Def^t the loss is as proper Est^d 523
Pl^r and no a nest of this person, but merely for the
loss taken. The action lies. The first suit being
malicious. If the Def^t had said and a second Gobart 203
Pl^r and said the Def^t goods under it, after he Est^d 206
was taken other goods under a former Pl^r Bulmer 12
action lies for vexation, and damage.

The particular grievance must be stated,
(when founded on former vice proceedings) 2 Wiem 304
and that it was done maliciously, and with Est^d 532
intent to injure and affront the Pl^r. So on 1 Talc^r 14
purpose to hate the Pl^r to be said, if that is the 1 Sedg^e 434
injury. No damage being presumed. and 3 Ray 380

Quid. Whether, in unjustly a wrong, a
Debtor from him without any fraudulent con-
cept to the creditor, but from apparent malice
is a foundation for this action. Q. It has been
said not to lie by one Sup^r Est^d

In the above excepted cases, it is necessary + Talc^r 1415
that Special damage be laid, and proved. 3 Ray 374
"Sums" is a stranger incites it to being a ground-
less suit agt. D. no Special damage is necessary Talc^r 14
as agt. him. (as in Criminal cases) - there is not 3 Ray 380
a claim of right by him - he is not a recoverable
liable to costs.

There are two requisites in all cases, to sub-
stantiate this action for a vice suit. viz
1st That the former action be determined, i.e.

Dang. 208^s it is ended for it can't otherwise appear to have
 Salk. 15^s been granted or against

2^d Damages (is actual), already incurred
 as to 527, or inevitable. Suppose if one signs a bond
 114 in my name I can have no action till I sue
 Buller, 13 upon it.

But it is not necessary that the Gov.
 527 should have been suited in the
 name of the present Gov. & Gov. now suit has
 been on the original action yet this is
 527 any ground for proceeding by action when ended
 is this point sufficient.

One Statute gives an action agt. and who
 willfully and wilfully wrong others, by assault
 in any suit, & with intent to vex and
 139 trouble, & and to vex and damage. It also sub-
 jects to a fine of 100^s and for the third
 offence to be proceeded agt. as a common law
 action

Two cannot join in an action for a
 145 vexatious suit the injuries being separate and
 5 personal. But this may be two if it seems

Whether damages may be recovered in this
 action agt. several is a question. Two cases contain
 79 How can they be recovered? The malice of the
 910 party enters into the consideration of damages
 537 They are not recoverable by any practice & reward.

4507

Action of Trespass for Injuries to Personal Property

Trespass in its most extensive sense at C 3d Brim 208
Law is any transgression of Law short of Felony 5d Brim 157
Felony or Misprision of Treason or Felony. When Jurisdiction
not considered as a word of technical import
"It is any violation of any Law."

The word as now used in Law denotes Esp. 380
in its general sense any unlawful Cornish 5d Brim 574
led to the injury of another person or real estate

The word in its most appropriate sense Esp. 380
imports only injuries by force to the real and
personal property of another.

The Trespass now to be considered com-
prises all possible injuries to the personal prop. Esp. 380
erty of another.

The rights of personal property in pos-
session are liable to two species of injury. 1st
1st Loss or damage while the possession of the 3d Brim 148
owner continued. 2nd Amputation or depri-
vation of possession.

II Of abuse of personal property with-
out altering the possession. C of Persons ones Cat 3d Brim 153
the killing his beasts or doing any act which
takes away from the value of a chattel falls
under this description of injury. So if its divided
heads be - The

30 Bourn 153 The remedy in these cases if the act is accom-
 5 Bourn 582 panied with force, and is immediately injurious
 2 R. & L. 550 is by Trespass. "Et et armis" If Can be brought
 8 B. & C. 568 when Trespass is the proper remedy, it may be
 5 B. & C. 128 2nd. 131 arrested, and "vici versa"
 6 B. & C. 141 2d. 196

III Of Nuisance or Depreciation of Possession.

This species of injury to the act is remediable by
 30 Bourn 152 Trespass. "Et et armis" counts chiefly in an unlawful
 taking, can a nuisance be deemed being, sep-
 arately remedied by Detinue, or Trover. See Trover.

The action of Trespass "Et et armis" gives dam-
 30 Bourn 151 aged, not restitution in specie. It lies not for
 taking a ship or goods or prize, tho' the property
 has been adjudged to be a prize. For the
 5 B. & C. 572 question depends on the Law of Nations, and
 2 B. & C. 598 is triable in the Exchequer.

But in some instances where the
 2 B. & C. 381 rigence taking is lawful, Trespass lies for sub-
 6 B. & C. 147 sequent injuries. E.g. if a beast is taken as an
 15 B. & C. 122 stray, and afterwards detained, Trespass lies, tho'
 8 B. & C. 140 Det is a Trespasser from the beginning.
 5 Bourn 580-1 In some cases Trespass lies not.

2 B. & C. 383, 405 Rule. When the authority to do the orig-
 5 Bourn 581-2 inal act is given by Law, an abuse of the au-
 2 B. & C. 1281 thority makes one a Trespasser "ab initio".
 5 B. & C. 161 E.g. of the Exchequer. So if a person enters a Garden
 8 B. & C. 140 and afterwards steals, he is a Trespasser (by relation);
 2 R. & L. 551 on entering. 8 B. & C. 140 can't reach property. So
 1 B. & C. 96-7
 10 B. & C. 30
 3 B. & C. 20
 1 B. & C. 20
 1 B. & C. 12
 1 B. & C. 12
 1 B. & C. 221

So if a Sheriff does not make return of a writ when he ought to E.g. mesne process. (This can form an exception to the general rule laid down in the first page that a writ is not in its general sense any misfeasance, but this is a mere nonfeasance. And)

5 Com^s 581
2 Polk 553
L 15.20
30 Bar 162

But the subsequent abuse of the right thus given by Law must be punished a misfeasance, not a nonfeasance. E.g. case of a Tavern "keeper" when the Debt Stole. But he would not have been a Sheriff's abettor for refusing to pay the Tavern for his entertainment.

8 Polk 383
5 Bar 161
8 Coke 146
2 Bull 312

So if one having taken a distress lawfully refuses to deliver on tender of sufficient amount

5 Com^s 581
2 Polk 556

distressed of goods &c. Here the injury is done by Case There is an exception to the rule

Polk 5130

in the case "Supra" of the Sheriff who omits to return a writ &c.

5 Bar 162
Tulk 409
5 Bar 632

When the party gives the witness an oath which the original act is done, the other cannot be made a Sheriff by relation

Parkins 191
2 Tulk 64
2 Polk 551
8 Coke 146
Yelv 907

For the Law will punish (in case of abuse) the very act which was authorized by itself. yet it will not allow a party to treat that as unlawful which he himself made original by law. E.g. unlawful detention or abuse by a Bailiff &c. The rule in Com^s 581 is in 5 Bar 162 p. 20.

5 Bar 162 p. 22
5 Com^s 581
5 Bar 162 p. 20

If indeed the Bailiff destroys the thing Litt See 71
Tulk

Co Litt^r 376
 5 Cohe 13
 248.
 5 Bac^r 200
 Supp page 52-3

But fast it is said that for he extinguished the fire
 must. But is not a fast fasted "ab initio" I conceived
 to maintain the action the 1st must have
 possession. Property a cond is not sufficient. Co
 Litt^r 383
 45 Rep^r 489
 The 1st is a House and furniture to S. the 2nd
 finding the 2nd is an 8th on the furniture as
 belongs to S. the 1st is a 1st fast and it was ad
 judged not to be - the 1st was not fasted. it should
 have been proved. It now holds that there is no title.

5 Cohe 577-8
 5 Bac^r 104
 22 Rep^r 509
 15 Rep^r 480
 45 Rep^r 489
 10th 19
 5 Bac^r 104
 5 Cohe 578
 248.
 21 Rep^r 258
 15 Rep^r 438
 22 Rep^r 509
 5 Cohe 577
 20 Rep^r 551
 L. 25

But constructive possession is agt a Stranger
 sufficient. As a Bailor.

So generally and being the general
 property may agt a Stranger maintain fast fast
 for it draws to itself a possession in Law

The title of Cattle may maintain fast fast
 agt a Stranger for taking them &c

The general property contemplated by that rule
 must suppose a right (either absolute or condi-
 tional) of present possession. Quia as in case of
 Bailor to keep Cattle &c. it is contrary
 to 45 Rep^r 489. 15 Rep^r 480. Co Litt^r 383. Suppose the Car
 of a Bailor for hire for a certain time.

5 Bac^r 104
 5 Rep^r 389, 92
 Co Litt^r 89
 4 Cohe 84
 20 Rep^r 560
 2 Land 47
 5 Bac^r 104
 re 18

So he who has the special property in goods
 may bring fast fast. The same generally as in
 Taver the Bailor and Bailee may both maintain
 the action

If the Bailee delivers the goods to a
 Stranger

Stranger, the Bailor cannot maintain Trespass, tho' in some cases he may rescue (ante) Secus if the Bailor has only the bare custody as a servant.

If property is given to one he may maintain Trespass before he has taken possession. - for property draws a possession in Law. (see Contia page 47)

If Goods of a Testator are taken away before the Will is proved the Ex^r may maintain Trespass after proving the Will. He has by relation a constructive possession from the Testator's death his right is from the Will and not the Probate.

So a Legatee of Specific Goods may maintain Trespass for taking after the Ex^r assents tho' it be before delivery to him by the Ex^r. "Aliter" of the Legatee of a Residuary part of the Testator's Goods, not specific. And in the first instance Judge Ross supposes that Trespass would not lie if the taking was before the Ex^r assent to the legacy.

In Trespass for Goods taken &c. and belonging to two both should join, but the defect is filled by an after verdict only. As robbery; Grand Larceny &c.

It seems that at C & L Trespass does not lie for an act amounting to Felony, as robbery Grand Larceny &c. by reason of merger. The English authorities are contradictory as to the application of this principle. There is no such principle here. Muzer is founded on consuetudine it seems. Ann. Reg 8, 3. 2 Ray 1572. 3 Wils 170. Con. Bull 131. Cant. and Dowland

5 Bac 175 p 30

5 Bac 170

5 Bac 164

Litch 214

p 10

5 Bac 164

2 Bull 268

15 Wils 480

5 Bac 164

15 Wils 480

1 Com 12

Salk 32

3 Levee 384

1 Roll 31

Exp 411, 580

Salk 4

Litch 323

St. 820

8 Com 582

5 Bac 170

1 Levee 21, 47

1 Com 130

1 Levee 34, 30

2 Bull 557

1 Wils 283

1 Com 148

Litch 144

Ray 82

The P^l must state possession or property then
 ing a right of possession, i.e. either an actual or con-
 structive possession, "from the P^l's person" is not
 sufficient. Taking "land from the P^l's land" is not
 sufficient. Decisions in these cases are not good even
 after verdict.

Est. 400
 D. 383
 Lath. 840
 Geo. 46
 43 B. 490
 120 480
 2 Lewis 156

The value must be stated. Est. 588
 that the value need not be alleged in the declaration
 omitting the averment of value is cured by ver-
 dict.

Est. 407
 5 B. 160
 15 B. 39
 2 Lewis 230
 Geo. 129
 5 Com. 349
 2 V. 174
 4 B. 2455

The pendency of another action ag^t the
 same party or parties, for the same trespass is a good
 plea in abatement. Secus if the other action
 for the same trespass is ag^t a stranger.

5 Coke. 81
 1 Com. 4650
 D. 110
 1 Bacon 13
 Carth. 90
 Hobart 138
 48 B. 489
 5 B. 420
 1 Bacon 192
 15
 4 Bacon 48
 Est. 407. 5. 819
 D. 321

The day laid is not material. The P^l
 may prove trespass at any time. (not within
 the Stat. of Limitations). Therefore if a release
 is pleaded, the Def^t must traverse, as to the
 subsequent time.

Butler 17
 2 B. 231a
 60 Litt 283
 Geo. 32
 Hobart 104
 5 B. 100-7
 Bull. 38

The P^l by way of aggravating damages
 may say in his Declaration, things for which he
 could not have an action. "Quod Libet" as
 aggravate damages? - and "Spauld and Ballou" page 419.

Est. 407
 2 B. 190
 Lath. 119
 18 B. 81
 1 B. 787
 3 B. 377
 Lath. 842
 5 B. 1032

If trespass is committed by several, the
 P^l may sue ag^t one or more or all. So
 he may ag^t each one separately.

5 B. 192-3
 5 B. 420

For a judgment ag^t several one is compul-
 sed to pay the whole, he can't oblige the others to
 contribute. This rule is common to all For^s. But

Had 104
 8 B. 180
 11 B. 110

5 Bac¹ 1923 But if it appears from the Declaration that
 Leonard 41 the Def^t with another person (certain, come
 Hobart 199 under the first part the Declaration is etc. for not
 Hug^o 420 joining the latter. There as to the principle
 said being several. And the Def^t pleading or
 showing the fact does not hurt the Declaration.
 After if the Def^t is not known

A Justification must be pleaded If a
 Edg^o 411 justification pleaded by one of several shows up
 Co. Litt^o 282 on the whole that the Def^t had no cause of action
 Hug^o 41 on the whole that the Def^t had no cause of action
 Edg^o 421 Just^o cannot go against either even if one has def
 Hug^o 610 and a default or been found guilty &c. &c.
 Hobart 54 And a default or been found guilty &c. &c.
 Edg^o 1379 And a default or been found guilty &c. &c.

Roworth & Phelps in *Roworth vs Phelps* in the Court
 cited there was a singular decision

4 Bac^o 11 In England "vi et armis" and words of
 Find - substance. For as I saw the judg^o in case of
 8 Co. Litt^o 39 408, terrible injuries was a "Capital offence" - in
 5 Bac^o 191 others the Def^t paid a sum of Money outbating
 Fitz. N. B. 190 out the original and the judg^o was a "miserable" one
 Jack^o 630 out the original and the judg^o was a "miserable" one
 Co. Litt^o 409 out the original and the judg^o was a "miserable" one
 Co. Litt^o 443 out the original and the judg^o was a "miserable" one
 D^o 520, 530 out the original and the judg^o was a "miserable" one

And the words "vi et armis" are words of
 5 Bac^o 191 away by the 10th & 11th and 12th. But the Def^t
 Jack^o 630 pays a substituted or signing Judg^o in actions
 5 Bac^o 980 for injuries with force. viz 6/8. Therefore the
 Edg^o 411 reason of the rule continues.

Edg^o 630 No contra "vi et armis" and words of "substantive" in
 5 Bac^o 192 England
 Edg^o 408
 Fitz. N. B. 63
 Jack^o 60

These defects are aided by Verdict Docket to amended by 8th 408
 Stat¹⁶ and 17 Cha² 2^d 7 Tack² 540

It was decided in Court nearly 30 years
 ago. that Redhaft and Redhaft on the Case must be
 joined in one Determination. There has been no late
 decision. At C² such a joining would be it 8th 30
 because different Judg. would be impossible.

Now the Capital has been taken away
 by Stat¹⁶ of Wm Blauget the general decision 3rd Wilson 32
 has been been the difference in law next to the Judg 2nd 321

Case for misfeasance and negligence may
be joined with force. Redhaft kick ass and 2nd Wilson 319
force cannot be joined it seems 2nd Wilson 322
 1st Rep² 274.

In Court the rule is to join as many as possible
out as to the two causes of action. 2nd Wilson 322

The identity or difference of the Judg. and not 1st Rep² 274
a universal decision. But when the Judg. and 4th 347
for the same and the same they may be universally joined 5th 347
 4th 347 11
 6th 347 20

Action of Replevin

In England Replevin is a redress to the owner by legal process of Cattle or goods distrained for any cause on security given to try the right, and to recover if Judge is agt. him. Distress is the taking of a personal chattel out of the possession of the wrongdoer into the custody of the party injured to procure satisfaction for the wrong committed. It is the act of the party injured. It sometimes signifies the thing taken by distress

48 Bae 372
Esp. 340
Co. Litt. 145

3 B. & C. 6

Replevin lies not for goods so taken by a mere trespassing agent. Quare Replevit 52.

2 B. & W. 93
Bullew. 53
3 B. & C. 140

This writ is not given but upon security given by the Distresser the right of the distrainor be in England and to recover the property if Judge is for the distrainor.

3 B. & C. 13
D. 147
Co. Litt. 145
Esp. 347-8

In England if the Distresser in replevin does not pay the right and does pursue his action or fails in it the property is to be returned to the distrainor. He may have a writ "de retorno habendo" If being returned to the distrainor he may keep it till tender of sufficient amends.

Co. Litt. 145
4 B. & C. 382
D. 3723
3 B. & C. 147
D. 1582
8 Co. 147
Esp. 377

Tender of sufficient amends before distress makes the distress voluntary - if before impounding it makes the impounding or detained voluntary not the taking - if after distress for the distrainor it makes the detained unlawful. ut supra and.

8 Co. 147
Bullew. 50.
Esp. 357
2 B. & C. 40
5 Co. 147
2 B. & C. 501

8 Coke 147^a and in the last case the Plf may have delivery
or a Subpoena Fines.

When a distress is taken it is to be in
3 Brou 12. seized immediately chattel in a found Cauch
Co Litt. 4^t. and a small generally in a found over.

We have no found Cauch here.

In Corp the security is a substitute
Plow 360 for the property replevin. It obliges the bond
man to respond in damages much, and the
property is not redelivered in the distress to in
any event. Formerly in England a distress being
in nature of a pledge it could not be sold.

3 Brou 10-13 The distress could only keep it as a pledge
10 Brou 588. ment. to the owner if he was stubborn. That
have in a great measure ruined this incor
3 Brou 10-13-14 ruined. especially in case of distress for rent
by allowing a sale in certain cases. but not in
3 Brou 14. case of Cattle damaged feasant and some
8 Coke 141 other cases. There were always some exceptions
12 Mod 330 to this rule. So if the distress was made in the
name of the King or to enforce an arrestment it
could be sold at law.

4 Brou 373 Arrestment of Replevin is demanded at a
Co Litt 145 right of right and even the rent is guaranteed with
right of distress impeachable.

3 Brou 6-7 The principles cases in which distress can
Co Litt 40. be taken by the English Law. and last. 1st In case
Esp 355-54 of "Cattle damaged feasant" 2nd In nonpayment
2 Brou 89. Rept. The second is not in use in Corp. To

In England there are certain other cases of
neglecting suit or service for a merchandise. rolls
good rules &c

3 Bourn. 87
Co. Litt. 40.
Est. 364
D. 353

In England Replevin runs as at Edm by
Writ out of Ch. or under the Stat. of Marlbridge by
Hench. & the Sheriff's own process or command
made. So the Sheriff may order his Bailiff by word
to replevy. +

Est. 346

Est. 347

2 B. N. 169

In England a writ of Replevin lies in
all cases (I believe) in which a distress is taken: ex
cept when the distress is founded on a caption in
Writheam. This is a distress by the owner of the
original distress the latter being carried out of the
County or concealed in which case the Sheriff re
turns that the goods be and seized. is carried to
a distance, to a place unknown

It obtains when the original distress having
retained the goods agt. the writ of Replevin, on a
claim that they are his own (which claim is
decided agt.) converts them to "ut supra". So if there
is no such claim, but the property is concealed
&c. - Here there can be no Replevin, till the second
distress till the original distress is forth coming.
When a writ is returned & is awarded, and the
distress cannot be found a "Fieri Facias" lies agt.
the "pledger" in the writ of Replevin *

3 Bourn. 149

2 B. N. 60

3 B. N. 73

2 B. N. 473

4 B. N. 382

2 B. N. 173

Est. 347

Co. Litt. 382

2 B. N. 370

2 B. N. 41

In COMW. a writ of Replevin lies in other
cases than those of distress & in all cases in
which cattle goods &c. are impounded & distressed
attached or seized. exception by for fines or
sales

St. Conn 360 notes on for some cases made before the main
 term. Perhaps all the cases not executed in
 the Stat. will be heard only if properly taken, and
 2d. 89 see our work of Attachment and of Cases taken
damage for want 1st of Replevin in case of Cat
 (detained damage for want). 2nd In case of
Goods attached.

II Of Replevin of Cattle detained damage for want

In this case the owner of the Land has his action to
 have his property restored and impound the cattle
 2d. 89 91-2 But if he detains and the cattle escapes his action
 of Replevin is gone unless the escape was without his
 fault. The Land is the rule in case of the cattle dying

4. Dec. 373 At C. Land the proceedings in Replevin were
 5. Dec. 179 Replevin - this work must be put out of Stat. - the
 12. Dec. 558 Goods do. were that some detained from the owner
 13. Dec. 31 By the Stat. of the charge 52nd Conn. 3rd the Stat.
 if it is enabled to replevin immediately

There is an analogy between taking the
 2. Dec. 354 body of a debtor, and impounding cattle both are
 3. Dec. 179 pledges. The demand is not satisfied in cash, and
 12. Dec. 553 by escape (unless the party impounding is in
 fault). In both the pledge being held on there is no
 other remedy.

In Conn. when cattle taken damage
 for want are impounded the owner not only
 may but must after notice replevy, or redem
 them within 24 hours or incur a forfeiture of
 17 Cents per head for every day's neglect besides pay-

St. Conn 345
 (2nd - 346)

Paying the expenses of keeping and their forfeitures and costs applied for payment of the same age bond and four age. Then the overplus to be divided equally between the Town Treasury and Ground keeper to be returned by an Assistant or Justice who is to issue Ex. Receipts,

In England now the owner of Cattle & Horses, Feb^y 13
must provide them with a shelter and put into a 60 Pitt 47
ground covered: then the distressed must do it

If the owner, complains in this case, and proof is given for the Defective Replevin he will recover in the action for the damage done by the Cattle Detriment of and have ^{costs} ~~costs~~. If the ~~costs~~ is not discharged by the PR 200, the complainant his servant man is liable and that the body of the PR is taken in ~~costs~~ and he and his person or is discharged.

Every writ of Replevin for Cattle taken & damaged & a servant contains in form an action of Replevin. Generally however the Def't in replevin does not expect to recover damages but appears for the purpose of having the Def't's damages assessed. If however the Callee were injustly taken the Def't in replevin recovers his damages.

The Pound keeper has a lien on the cattle impounded for his fees in case of settlement between the parties. None as to this right against a replener.

The Corp^d of the names of called taken down
age persons is not known a constable is to be
informed who is to post them in the Town and the

the two next found. And if the owner does not appear in a certain number of days, so many are to be sold, as to pay the damages ^{and} defray the expenses, and in the mean time the impounded supports them. Such Cattle are also to be sold under certain restrictions distinct damage feasant.

Generally when cattle enter the the insufficiency of the fence of the owner of the Land, no damage is recoverable. But if they pass the good part of the fence, partly good, and partly bad damage is recoverable and they may be impounded. So if the cattle are murdered.

So if they enter from the highway, it is immaterial at Law whether the fence is good or bad because it is intended to prevent them to go and range in the highway.

But in Conn. black cattle, and sheep are by usage commonable, and tho they enter from the highway, yet if the fence is insufficient, no damage is recoverable. Horses, swine, and deer entering from the highway, so that the owner is liable.

But a Stat in Conn enables Towns to make any cattle commonable, and then there is no difference between entering from the highway and from an adjoining field. Quare.

For mischief done by animals from a disposition, common to the species, the owner is liable without notice or knowledge, as a Bear sitting out.

on Cattle trespassing. For that committed from a Dyer 25:29
 disposition not common the owner is not liable *Est. 601*
 without liens. Eg. a Day riding. The liens is *Est. 600*
 not traversable is in liens but must appear *Mod. 4*
 true or false in evidence. In action on the case, *4 Coke. 18*
Wolfe 350

If the owner of Land chase a beast dam
 apparent on to the land of the owner of the *Latch 120*
 beast he is not liable for chasing. If a stranger *5 Bac. 179*
 chase the stranger is liable to liens

The distressed is not allowed to use a beast *3 B Com. 13*
distressed - he becomes a trespasser ab initio *Wolfe 148*

When there is a liens in replevin the Def
 may either deny the taking or show his liens *4 Bac. 388*
taken. I speak only of replevin in case of beasts dam
apparent

The gen Officer is "non est" upon *West 249*
 the issue claim. If property can be given in *4 Bac. 388*
evidence - it should be pleaded in England - *Bullen 54*
Talk. 5
2 Levin 92
6 Mod. 81

Assault is in nature also of a liens to the
replevin - The replevin is in nature of a plea *4 Bac. 373*
 to the assault. In this case both parties are *2 Mod. 149*
adversely plea - the owner of the Cattle being *Wolfe 798*
for damaged and the assault in England for a
return of the Cattle and in some cases damaged

In Corn both civil damages only the Bull *01*
Cattle being here not returned,

The assault is in nature of an action of *4 Bac. 373*
plea from the assault right to move liens *Est. 370*
2 Weim 17

Salk? 95 for the return of the distress and in some cases.

4 Bar 373. damaged 2^d The P^r may proceed in a habe-
 Geo E 530, 798 ment, & take away. 3^d The assendant need not
 Coth 722 claim with a restitution.
 4 Bar 373
 Salk 103
 Warden 203
 Agoston 148

But the taking away is in nature of an ac-
 tion on Tenent in Common, may it be said pro
 4 Bar 373 without his fellow. He must make cognizance
 R. 374 as bailiff of the other.
 Humphreys 253
 2 H. 380
 1 R. 220
 14.
 2 H. 387
 Coth 340
 Salk 389
 2 Bar 422

Tenants in Common may have several
 awarded for rent because they are in the reality.

As to the Land may come in question
 in this action it has been said when this is the
 4 Bar 373 case, a real action. It is now holden to be person-
 R. 310 al as trespass or Debt. For Land cannot be recover-
 Coth 470 ed in it.
 2 472, 27.

In Case of a writ of Replevin in case
 of cattle damage, Tenant is returned to a Justice
 and the damage & costs his jurisdiction he must
 dismiss the Suit I suppose. R. 250

Under our Stat of Beasts taken damage
 4 Bar 340 Tenant and impounded escape the damage and
 poundage and recoverable by action of Debt, the
 impoundment making oath that he took them
 damage Tenant.

It is a rule that a distress must be
 4 Bar 311 taken on day except in case of Beasts damage
 Coth 300 Tenant lest they should escape
 Coth 142
 4 Bar 101

Distress for damage Tenant must be made
 2 Bar 300 while the Beasts are on the Land. It was for-
 Coth 142 merly so with respect to distress for rent.
 960 22 except

except that it might be taken on Just Suit. 3d Bon 11
It is now reserved by Stat.

As to distress for rent - Formerly the Land
lord might take as large a distress as he pleased 3d Bon 12
The Tenant had no remedy. He now has by the
Stat of Marlbridge 5th Henry 3rd a Special action 3d Bon 48
on the case. This right is not maintained in this
case. It being necessary a Special action except where Gold
or Silver (being of a certain known value) were
distressed. In other cases a Special action on the
case founded on the Stat is the proper remedy. 1 Vent 104
Reg 851

Distress for rent is immediate of course.
right according to Law; to those cases only in
which the Debtor or owner of the rent has the reversion 3d Bon 15
- not where he has no future interest as in
case of rent charged on where the owner of the Land
conveys his whole interest reserving a rent. But
he may have the right by Clause of distress at Law 3d Bon 48

Now the right of distressing is by Stat 4th
Geo 2nd extended to all rents 3d Bon 43
3d Bon 0
Est 355-0

In case of distress for rent by Stat 17th
Ch 2nd if the Debt in the action of replevin paid 3d Bon 150
paid he recovers his Costs and so much in dam
ages as is equal to the value of the distress. if that
is less than the rent due but if the distress is
equal to or more than the rent due he recov
ers in damages the amount of the rent and in
the first case the distress may have a fauther
distress

II In case of personal property attached

2 Swift 93 Replevin in this case is never an adversary suit
 Thibby 274 there is no hearing on the replevin writ. But on the
 Thibby 276 attachment. It is called a "mandatory process"
 requiring the offender to redeliver the goods &c

By this writ property is restored to the
 2 Horn 360 owner on his finding security to present and to
 answer such damages demand and costs - as
 the adverse party shall recover. The security to
 present the replevin &c in this case is mere
 matter of form.

Replevin is founded on good policy that
 the owner need not be disturbed of his property
 for a long time and as attaching is but for se-
curity he suffers no injury security sufficient

The object being to regain the property the
 2 Swift 93 practice is to charge no wrong nor demand dam-
ages. there is no pretence that the taking is illegal

It has been decided by our Sup. Ct that a
 Thibby 276 replevin of goods attached should be directed to
 the officer who attached them requiring him to
redeliver (not deliver) to give notice to the Plff
 in attachment and to return the writ

The replevin is returned to the ^{at} in which
 2 Swift 93 the original action is. The bond is the pledge
 2 Horn 28 to secure the original Plff and is preserved in at
 on file for his benefit. The bond is taken. (as

(as all bonds to prevent removal are) to the adverse party the Dft in replevin

The Plaintiff is in some measure surprised and by replevin the Magistrate taking the bond and administering it and he is liable if the bond and Bond 60 is insufficient. (but not if the bondman is paid & paid at the time) and the action may be lost against him tho no previous suit has been lost against the goods.

The Court surely in this case for the whole debt I conceive as in England the Sheriff does even over the amount of the bond taken as the case may be. The case in 2 H. R. is stronger than a similar case here the Bond in England being for the return of the goods. The action is 2 H. R. 30

8 H. R. 28
1 H. R. 75
Case 1
2 H. R. 54
2 H. R. 30
Est. 348
Doug. 330
4 R. 433
Case 1
2 H. R. 30

It was for some time doubted whether the action 2 H. R. 30 would lie. The bond in Eng. is double the value of the goods 2 H. R. 30

It has been a question in Conn. whether the Dft bond might be taken by the Magistrate. It was decided in the Ct of Errors that it cannot at least that the Magistrate is liable on the Dft failure the responsible when the bond was taken. Suppose the Dft does not fail is the Justice liable in the first instance?

It has also been questioned whether when property to a small amount is attached and replevin the bondman is liable for more than the value of the property? There has been no decision.

15th Feb 438

2d Feb 547

8th Feb 3.18

2d Feb 302

con

decision. Judge Rogers' opinion is based upon the words of the Statute. But the words of the Statute are explicit. It is an analogy to the case of a free citizen, who is always liable for the whole, and not for the value of the property. Decided Contra.

(From an analogy to the case of bail and of bonds, it is seen that it clearly appears the bondman would be liable only to the amount of the property attached. The analogy of the liability of a receiptman is also a support to the opinion that the bondman would be liable only to the amount of the property attached. But still the words of the Statute are so explicit that it is probable our Court would make him liable for the whole damages.)

It has been questioned also whether a bondman can discharge himself by surrendering the goods after a judgment for the debt and for the value of the goods.

This question depends in some measure (so far as it is affected by the extent of liability) upon the former. How far he is liable, it is not like the case of a receiptman. He is bound only to deliver - it is not like a bondman in English law, who engages only for the return of the property. I suppose that in Con. he cannot.

15th Feb 270

2d Feb 93

If the property of one is attached for the debt of another, restitution does not lie. But this is not the case in that case is not an adversarial suit and no one can reply unless he is a party to the suit and has a property in the goods. So.

So it seems, replevin is not the proper remedy for a merely trespassing act according to the English Law. It being granted upon a distress

Bulwer 53
Co Litt 345
Esp. 345
3 BB 13. 140-7
2 Troit. 86
Bulwer 52.

If the cattle of a feme sole are distrained and she sues the Husband alone, may replevy for the property because the Husband by intermarriage. But if the Wife joins it is good as the verdict for the presumption will be that they are joint tenants.

Esp. 375
Widm 81-2.
Bulwer 53

The Ex. may replevy a distress taken from the Defendant.

Esp. 375
1 Sidm. 81-2
Bulwer 53

If the goods of several are distrained they cannot join in replevin the injuries being several.

Co Litt 245
Esp. 374
Bulwer 53

Goods distrained in a foreign Country tho' not here, can't be replevied here. The Cause might be caused there.

Esp. 372
2 Shawm.

Replevin lies of things Personal only - not of lands of Lord. Replevin is founded on the right of a Subject on property in the King's Court. Therefore it is a good plea in Abatement or in bar that the property is in a Stranger.

Esp. 372
4 Bac 385
2 B. 68
Esp. 351-2
4 Bac. 373
2 Levins 92
Co Litt 74
D. 343
Falk. 94.

It is different from actions of trespass where the Plaintiff's possession is sufficient for in replevin the Defendant is in possession, he is dispossessed by the replevin itself.

Bulwer 53

Action of Trespass on the Case arising "ex delicto" for injuries to Persons and Personal Property

This action lies for wrongs not accompanied with Bullen 74
force as well as with the act forbidden and injurious * 2d Com 1223
- and culpable neglect or omission. * and for Esp. 598
Consequential injuries occasioned by acts which are 11 Mod. 186
forbidden. Examples of the first kind of wrongs. 2d Ray 1399
Fraud - Malicious prosecution. Slander. "Mala" D. 1402
"Fecit" Of the second - neglect in a Bailor 2d Com 895
Servant's Office &c. Examples of the third kind. 3d Com 1534
Injuries occasioned by actions actually called. D. 2084
Trespass "per quod" &c. Esp. 545
2d Ray 167.

Throwing a Egg into the road over which one Surg. 630
falls &c. Digging a pit &c.

Actions of Trespass on the Case are gener 3d Revers 88
ally founded on the Equity of the Stat. of West. 243
minster 2d Case was undone at C. & G. 67-2
at C. & G. 123
2d Ray 1399
3d Com 448
2d Revers 20

In Com the found of delinquency and Com- 3d Revers 245
mon "parlance" makes a distinction between ac- D. 394
tions on the Case and actions of Trespass on the 3d Com 208
Case. Eg. Attempts to do in Com call an action
on the Case. Now Trespass on the Case the first
class arising "ex contractu" the second "ex delicto".
The English Law knows no such distinction. Af-
terwards is Trespass on the Case.

If Case is lost then Trespass is the proper ac- * 6th Ray 125
tion. And it is a noted "converto". Reason 3d Ray 1913 D. 131
4th Ray 141 on 90
2d Ray 506?

When there is no force in the transaction there is no difficulty. Case always

When the original act working an injury is with force. Redress is at times not in some cases and in others Redress is the Case Rule. If the act is immediately injurious Redress is at times not in the proper remedy as battery of one's self. False imprisonment. Destroying property with actual force. But if the injury is consequential. Redress is in the Case. Series to be the proper action. At the drawing of a log into the highway over which one falls. A log of seven feet a gallon of one's servant (white) In the last case the action is actually called Redress and Redress is taken to be the proper action.

There is a difficulty in applying the rule. The effect need not be instantaneous to maintain Redress. When it is instantaneous Redress only is the proper remedy.

Signifies which is not the instantaneous effect of the original force and in some cases. Redress is in Redress and other (Case). When the immediate cause of injury is but a continuation of the original force. It not being in means produced by the voluntary intervention of any rational agent. The author of the original force is liable in Redress. For in this case he is the author of the force. The original force is not the injury is considered in (Case)

Law as the immediate effect of the original force

But when the original force ceases before the injury commences. (as is always the case when the injury is produced by the voluntary intervention of rational agents and in many other instances) the author of the original force is liable, when liable at all, in case only. For then the ultimate force is not his act, the injury is not considered in Law as the immediate effect of the original force

Examples of the first kind. A ball that glances 25 Rep. 107-8
down times and hits B. Of the second kind. A 25 Rep. 845
kicks a foot ball. B kicks it at C. When one 25 Rep. 208
shoots a ball which after glancing ten times hits 25 Rep. 274
his servant the bodily hurt is in Law the immediate 25 Rep. 831
effect of the original force. For the proximate 3 Wilm. 18
cause, or ultimate force is but a continuation 25 Rep. 107
named of the original force, or "Causa Causata"

The servant then too has been injured. An injury in which the immediate effect of the original force. It is not indeed the primary physical effect immediate 25 Rep. 440
or remote of the original force. The immediate 25 Rep. 447-470
cause of the injury to A is the "Causa Causata" 3 Rep. 599
the physical hurt done to the servant. As proximate 25 Rep. 107
remedy therefore is case and actions by Masters in such cases always have been substantially, as on principle they ought to be case tho' they have been called negligence

It shows a stone which bounds once and in bounding hurts B. here the "Causa Causata" continues 25 Rep. 548
without intervention of rational agents. and 25 Rep. 530

It has been said to it 1000 times. So if one
throws a Log into the road and in throwing it hits me

But in the case of a foot ball hitting

Justice Blackstone Case was in the vicinity

1000 407 A ball shot at a man's glances and wounds head
Case 440 1000 204 Not kept in. It is in the right Case. So in turning
Est. 599 out a road or cutting through. Suffering from
Case 10 In these cases the injury is the immediate physical

effect of the force continued and not aided by continued
verging her agent. But if a Log is thrown into
the road and it falls over it Case lies in it not the
effect of the original force continued. So the Case is
a point.

In 1800 298 Case for using a wire
1000 208 Case which ran over the Df. Here I conclude
2000 172 the Df. was not considered as agent so far as re
Est. 899 later to the force. 2000 177 the Df. Case

he driving negligently ran with force against the
Df's horse. Case was adjudged to lie. Not alleged
as the act of the Df. but 3000 593 The Defendant
1800 188 told did not describe the force as the personal act
of the Df.

If I dig a trench on my land and di
vert a water course from my neighbour the injury
is the physical effect of force, yet Case not kept
lies. Here the proximate cause is negative. viz
failure of the stream. therefore not a continuation of
force.

1000 100 The servant in performing his Master's
Df. 472 Since it commits a direct injury with force negligent
6000 123 by a trespass on Case the proper action agt. the
2000 442 Master

Masted? Case I think. Supp 1083 75 Rep 279 Bun 2093.

2 New Rep^s 440. the Deft Ship ran over the Plff's Sack^s. 441
boat with force &c by negligence of the Deft pilot 5 Rep^s 649
Case. the proper action - not the personal act of the
Deft. - See Masted and Servant.

If A willfully runs his vessel agt B's. 8 Rep^s 188
happens, if it runs agt it by negligence Case. - 3 Bask 593
The injury is immediate in both Cases. It is A's act. 2 Camp. 464
in the former Case not in the latter. Cases of
miscarriage by one Dog &c. & path. Negligent driving
a Carriage. Fiddell agt the driver.

If the Servant does it willfully without the 1 East 100.
Master's orders, the Master is not liable. 1 Com 304

In the Case put of Lopping trees cutting down
the force is continued. It is one continued act. For
the Case of the Spout is "altered" for making the
spout does not cause the rain - not continued. -
then the force ended before the injury took place

Cutting down a tree & throwing it is not
one act. It is like throwing water into the Plff's Land
It is one continued act of force.

When Case lies for an injury arising in
consequence of an act with force the original act 3 Rep 344
may be said to have been done &c it is not the
action is Case. It is more description of cause.

Whether the original act was lawful or not 2 Bk 892
is not the question.

It is said that Case not Fiddell lies. Supp 836.
where the act is originally lawful &c. 2 Bk 899
322 184.
not.

1 Com. 582 Not bound. E.g. but of cutting trees, &c. meaning
2 R. 582
3 Com. 154
5 Com. 582
2 R. 582
ag. the tenant

1 Bacon 44
2 Com. 132
1 Com. 132
D. 244
This action lies for a great variety of misfeasance
same and misfeasance "Many of them have dis-
tinct titles as never Assumpsit standeth to

2 Esp. 599
2 R. 911
1 R. 232
Coke 219
A more neglect for which this action lies
on the ground of delictum must be a neglect of
duty imposed or required by law (E.g. a Prisoner
is not bound to keep it safe, if it escapes
this neglect is not liable "Quoniam Bailment.")

1 Com. 206
2 Esp. 379
R. 93
2 R. 386
2 R. 333
2 R. 380
Thus an unlicensed in his office a Sheriff is
liable to and other officers and private persons in
many cases. (An Corn a Sheriff would be
liable for not selling the property taken by process.
In England he may return the other remainder
on his hands "pro defectu employment")

2 R. 214
2 Wilson 386
Esp. 601
2 R. 123
2 R. 100
2 R. 601
1 Com. 105
A person performing business for another
in the line of his profession and doing it carefully
or negligently is liable in this action. But if the
business was out of the Dept. of profession he is not
liable for want of skill unless in case of a special
engagement. tho. for negligence he is. (But in case
of an undertaking in Physic or Surgery it seems
that unless the persons undertaking make the
practice of Physic or Surgery a common profession they are
not liable even for neglect without a special man-
dation. as the safety of the patient. It lies

It lies in general agt any one by whose act or
culpable negligence the health of any other is impair-
ed. Eg it lies agt a seller of bad wine which has injured
another's health. So for example, a nocturnal passer
during the same effect. (Quere if he did not know it
- to be bad) - there is an implied warranty that goods
are sold are good. 1 Don't 110

Esq. 501
1 Rolu 9095
3 B Com 122
1 Com 16670
9 Coke 32
Hutton 133
3 B Com 182
1 Com 166
1 Rolu 9025
3 B Com 100

For mischief done by a Dog as biting, if ad-
mitted to such mischief, the owner is liable having no
duty - not without such notice. Judge is an animal
notice must be given. Under an Act in Cork
notice is not necessary. 1 B Com 238.

1 Crooke 350
1 Com 208
Salk 662
3 Salk 12
Salk 90
Esq. 501-2
Vol 4. 75
Qd. - 320

For injury done by animals "ferae naturae" - as
beasts - without notice. 1 B Com 109 the the injury
be different as to the object from what the owner
had notice of. Shaw 1204. Salk 662. The scienter
is not traversable. Scienter not being a direct allega-
tion (on the ground of negligence),

2 B Com 500
1 Com 208
Crooke 254
4 Coke 18
1 Rolu 4

If a timber floats on B's property & B has
case of timber. It lies for disturbance in then
doing one from the free enjoyment of his right of
some kind - generally in incorporeal right Eg
obstruction of a right of way or diverting water course.

1 Com 208
2 B Com 258
Esq. 639
3 B Com 235-41
1 Com 199
9 Coke 112
3 B Com 208
6 B Com 845
1 Vent 275
2 B Com 480
2 B Com 1340
Hoy 5. 038

For an escape either on murder or civil pro-
cess. this action lies agt the Sheriff & Atty Gen.
the only action agt the Sheriff in either case was
distress on the case. Now by Stat of Westminster
2. & Richard 2. Debt lies agt him for an escape
under penal process. But case still lies in both
ind.

1 Com 245
1 Shaw 170
Esq. 609
Crooke 17
2 B Com 873

23th 1048 instance. When Debt is lost, the Jury cannot
 Est. 50970
 2nd 1048, given left than the whole Jury. Stated in Case

Est. 508-6
 Est. 273
 Est. 188,570
 Est. 148
 Est. 550
 When the process under which one is arrested is void no action for escape lies agt. the Sheriff. Sums if erroneous only.

Est. 503
 Est. 53
 Est. 18
 Est. 41
 Est. 403
 Est. 32
 Est. 141a 190
 Est. 23 Henry 5
 Est. 200
 Est. 313
 Est. 31
 Est. 145
 Est. 184
 Est. 484
 Est. 582
 Est. 561-2
 Est. 62
 Est. 211
 Est. 311
 Est. 123
 Est. 204
 Est. 419,486
 Est. 610, 657
 Est. 438
 Est. 180
 For appearance of a Sheriff agt. the Sheriff himself only is liable at C. D. Sheriff and Court for appearance on both sides and the Sheriff is liable to voluntary escape. Embrogling a Sheriff

If a Sheriff having arrested one on a return pro
 est refuses to take sufficient bail when returned he is
 liable in C. D. but not in Sheriff. not a Sheriff
 at initial the abuse of the authority of Law being negative.

The action lies also agt. the Sheriff of one
 taken on a return pro est. in favour of the original
 Sheriff (Sheriff is liable to) The Jury may give the
 whole Debt he or left. It is expedient to have the
 original Debt involved or out of reach. Sheriff is liable

Est. 510
 Est. 77
 Est. 169
 Est. 98
 Est. 438
 Est. 399
 So it lies for rescue of one taken by force
 pro est. in favour of the original Sheriff. Providing
 agt. Return discharged the Sheriff according to Est. 510
 So in this case in favour of the Sheriff

Est. 512
 Est. 513
 Est. 53
 Est. 513
 It lies for a Sheriff agt. a person escaping in
 three on return or force pro est. and that the the
 Sheriff himself has not been sued. So agt. the
 under Sheriff in favour of the Sheriff it deserves
 but not in favour of the party unless the escape
 be voluntary. But

But the under Sheriff cannot maintain the
action agt. the party who have used the Sheriff
has recovered agt. him for he is not liable to the Sheriff
by Law, but by contract the injury is to the Sheriff
and party not to the under Sheriff. *Quere in Conn.*

Attorneys are liable to this action for neg-
ligence or misconduct injuring their clients.

2d. 517
2d. 325
4d. 200
Sack. 80

Attorneys are sometimes liable to the adverse
party for dishonest practices. Eg. An Attorney having
by book *Indy* agt. the Deft after the original *Indy* had
been respected. The Deft has *Indy* agt. the Atty.

2d. 518
Hutton 125
3d. 377
2d. 165
1st. 209

It lies agt. Justices of the Peace for refusing to
do their duty. Eg. denying bail. refusing to admit
warrants which require his signature.
- as *Wright*. *Depositions* &c.

2d. 518
Leonard 323
1st. 90
1st. 97

It lies not agt. a person who has sued out
a writ, in not countermanding or settling an
affidavit is proved. No legal duty.

1st. 388
2d. 302

It lies for breach of trust in Bailment (ante)
Tells *Forced* and *Bailment*.

2d. 518
2d. 909

This action lies on the ground of negligence
in all cases of Bailment where the property is in-
jured for the want of that degree of care & skill
according to the nature of the bailment the Law
requires. (or which is expressly stipulated for)

1st. 2089
1st. 89
4d. 83
Sack. 20
1st. 133
2d. 909
2d. 518

It lies agt. a person or Master of Vessels for goods
lost or injured by negligence &c.

2d. 623
Sack. 440

But the owner of said it is said must
all

3 Talk 203 also he joined in the right of action is quasi "Contract
55 Prof. 551 and" 3 Talk 203 55 Prof. 551 con and shape the case
con.
in. Talk 440 was stated as an action on Contract

1. *Case* 523
 2. *Case* 2511
 3. *Case* 203
 4. *Case* 440, a balance sheet.

at 1st 024 last on Notes in them, that the fault of Subordin
 fact 17 male Affairs. The firm is for intelligence, not for
 cause 574 insurance. Extent of responsibility is same. No
 contracts were paid to him by the P^{re}

3 Wilson 453 But for actual fault of his own the Party
Master is liable. So are the under Officers.

3 Bar 179
 3 Bar 374
 3 Bar 345
 3 Bar 73
 3 Bar 32
 1 Com 210
 3 Bar 620
 3 Bar 105-6
 3 Bar 200

Trustees are liable for all property of their
 Guests lost for want of that degree of care which the
 Law requires of them. They are not liable for goods
 stolen by the Guest's servant or companion or taken
 by public enemies

To subject the Europe for good stolen to
the PP must have been a traveler and a guest and
received as a guest. A neighbor procuring a lodg-
ing is not a guest within the rule.

Rph. 527
 Cas. 2^d 188-9
 Lark 388
 See
 Larkspur.

Esch 327
 Esch 189.

He is liable for dead goods if the owner
 absconded without temporary and he is still a Guest
 & going out in the morning on business and re-
 turning before night.

Pickney

Take keep or house and memory is no excuse for
the Take keep. The Take keep is not liable for injuries
to the person of his guest by third persons as a trustee

Exp. 628
C. C. 622
Exp. 628
860 32

An Take keep is liable for not receiving
guests unless he has good reason to refuse. So as to
a Com. Carried for refusing to carry

Dyer 158
808 168
Hoard 153
28 Shaw 327
Bacon 344
320 180-2
Bullen 70
960 87
Exp. 629
Salk 211
1 Com 106-7
Holler 90
Yellow 20
Cuba 4

The action lies for deceit in sales as false
warranty - or false affirmation. Of affirming rent
to be more than it was. Wanting good to
be of such a value &c

Quere as to fraud in the sale of Free Estate --
2 Day 1287 C. C. 384 and 1 Fort 300 2 Cairns 193 Vol 2 353

Com. 111
38 C. 5 57
Hilwyn 086

It does not lie agt. the vendor for false affi-
rmation when the vendor has been guilty of res-
cued. As if the vendor might easily have learned
the true value &c. Of the vendor affirming that
I would give £100. So if the defects are visible in
general warranty extend not to them

Exp. 629 30
20 Ray 1118
1 Fort 110
Finch 289
1 Salk 24
Hilwyn 0867

Quere will not a Special warranty subject
in this case. General warranty of a House was
held in good after rescued tho he had but one eye

Exp. 630
1 Com 170
3 M 163
Salk 211
Hilwyn 086 ut

So it lies for actually disguising known defects.

Exp. 632
Black Rep 5

So when the vendor practices fraud by a false
affirmation in respect to his title to the Good sold
Quere in this case is said to be necessary - i.e.
when fraud is the gist (Science is not traversable
in pleading) For the Law see Exp. 632. Attyr 91. Bath 90
1 Com 171. 30 Rep 57. 1 Fort 100. 373. C. C. 474. Shaw 088

Salk 210
20 Ray 593
Bullen 30
Hilwyn 085 ut
Vol 2 348
Lo.

378 Rep 34

1600 107

Calk 033

Moore 583

Calk 90

179 268

Bull 32

Hewyn 094-5

Calk 325

Kale 100-1

Calk 3+4

Moore 3

27 282

Robt. Handl.

Conway 525

Calk 500

Calk 12

Calk 723

Calk 103

So it lies for injury occasioned by any
false affirmation made to defend, who the person
making it had no interest in the land. So for
injury done by cheating or false pretences. E.g.
false verdict. Personating &c.

It is a wrong to act - make an incorrect
person liable over to a third person. I am liable
to the former. E.g. I chase off cattle out of D's land
and then subject it to damage. I am liable to
him for the damage.

When a public right is obstructed or violated
to the injury of an individual. He may maintain
the action. But he must state and show
special damage. E.g. The Df as an inhabitant
of a certain place had a right to pass a ferry
hole free - the ferryman refused to carry him
for but his action stating the common right but
not saying special damage. The action lay not.
So the Public Nuisance occasioning private damage.

So it lies for injury received from a nuisance
in general. E.g. obstructing a river right. But it
is said it must have stood time immemorial.
"Fisher v. Wilson" had 40 years sufficient - perhaps 20.
(Presumption) of an acquiescence.

A man having built a house on his own
land sold it without the use any person claiming
under him may erect any building which will
stop its light. It would be an injury in recogni-
tion of his own grant - tho the best is not a nuisance.
But

Calk 58

Calk 216

Calk 239

Calk 170

Calk 118

Calk 439

Calk 110

Calk 630

Calk 175

Calk 400

Calk 400

Calk 400

Calk 400

Calk 400

Calk 400

Calk 400

Calk 400

Calk 400

Calk 400

Calk 400

But obstructing a prospect is not actionable. *3 Blk 217*
 matter of pleasure for me. *2 Coke 58*
Esp 630

A House built near a street is on the street
 side immediately entitled to the privilege of an an- *Esp 630*
 cient messuage, it seems. *3 Wem 401*
 the street is as to obstruct the windows. The builder *2 Blk 924*
 is not liable or in trespass in this case as when he
 builds by another's land

One remedy for damages for a nuisance *Esp 634*
 is no bar to another. Every continuance of it is a *Co Litt 191*
 new wrong. *2 Coke 703*

So the author of a nuisance does not *Salk 400*
 discharge himself by ceasing or assigning his actions *Co Litt 373*
 for injuries remaining after ceasing. *Esp 634*

So too in the last case the action lies against *Esp 634*
 the assignee or lessee when the continuance crea- *Co Litt 373*
 tes a new nuisance. *Do 555*
 "seems" where the whole *Dyer 280*
 injury is done by the first action.

The obstructing light action lies both in favour *Esp 634*
 of the degree for years and reversions, for it is an inju- *4 Wem 2141*
 ry both to the inheritance and present enjoyment. *Co Litt 325*
Do 237

So this action lies for overhanging the *3 Blk 210*
 House or Land so as to cast water upon it. *Wyl 184*
 erecting a shaft &c. *10 Rep 534*
10 Rep 107
1 Co Litt 213
2 Rep 140
5 Coke 101

So for erecting a Manufacture in the vapours *Esp 638*
 of which injures the *10 Rep 184*
 house. So for infecting the air about ones house in *10 Rep 107*
 any way so as to render it unhealthy. *1 Co Litt 213*
2 Rep 140
5 Coke 101

Injuries affecting persons, as standing in the

2d^o 644 relations (to other) of Husband, Parent and Master
 2d^o 645-67 have been treated of under the title of the "Domestic
 Relations" Husband Bullen 78. Cro Jac 501. 538.
 "Parent" 3 Wilson 18, 3 Bull 1878, 25 Dec. 100, 2d Ray 1032.
 "Master", 2 Saunders 169, Fitz KB 390 2. Leving 08. Casper 54
 2d Bull 387. 3 Bull 1345.

2d^o 648 The actions bet. in these cases have been in
 25 Dec 107 form. Redempt "re et amittit" but they are substantiated
 Talk^o 250 by actions on the case.
 2d Ray 1032

2d^o 649 For other personal injuries. At a legal voted
 Talk^o 19 tender. a vote. and the returning officer refuses to ac-
 3 Talk^o 17 cept it. Case lies agt him at C.E. So a candidate
 2 Bull 25 for an election officer may have this action agt.
 1 Wilson 200 the returning officer if the latter refuses to take or
 2 Leving 50 count his votes.
 3 Hobb 20
 2d^o 32

2d^o 647 So the returning officer is liable to this action
 11 Bull 99 in favour of the candidate for making a false
 return of the votes at an election. This summary of C.E.

But it is held that it lies not a false
 Talk^o 502 return of a member of Parliament and if the
 Bull 459 right is determined in Parliament in favour of
 1 Wilson 127 the Opp. - or cannot be determined as in case of dispo-
 2d^o 647 sition. There are rules of C.E. There is a Stat^o
 Moore, 87 in England on this subject (7 & 8 Wm 3rd) giving
 Dyer 275 double damages and costs

2d^o 648 So agt. an officer for making a false
 Bull 62 return is a Mandamus. it lies. See Mandamus.
 3 Bull 111

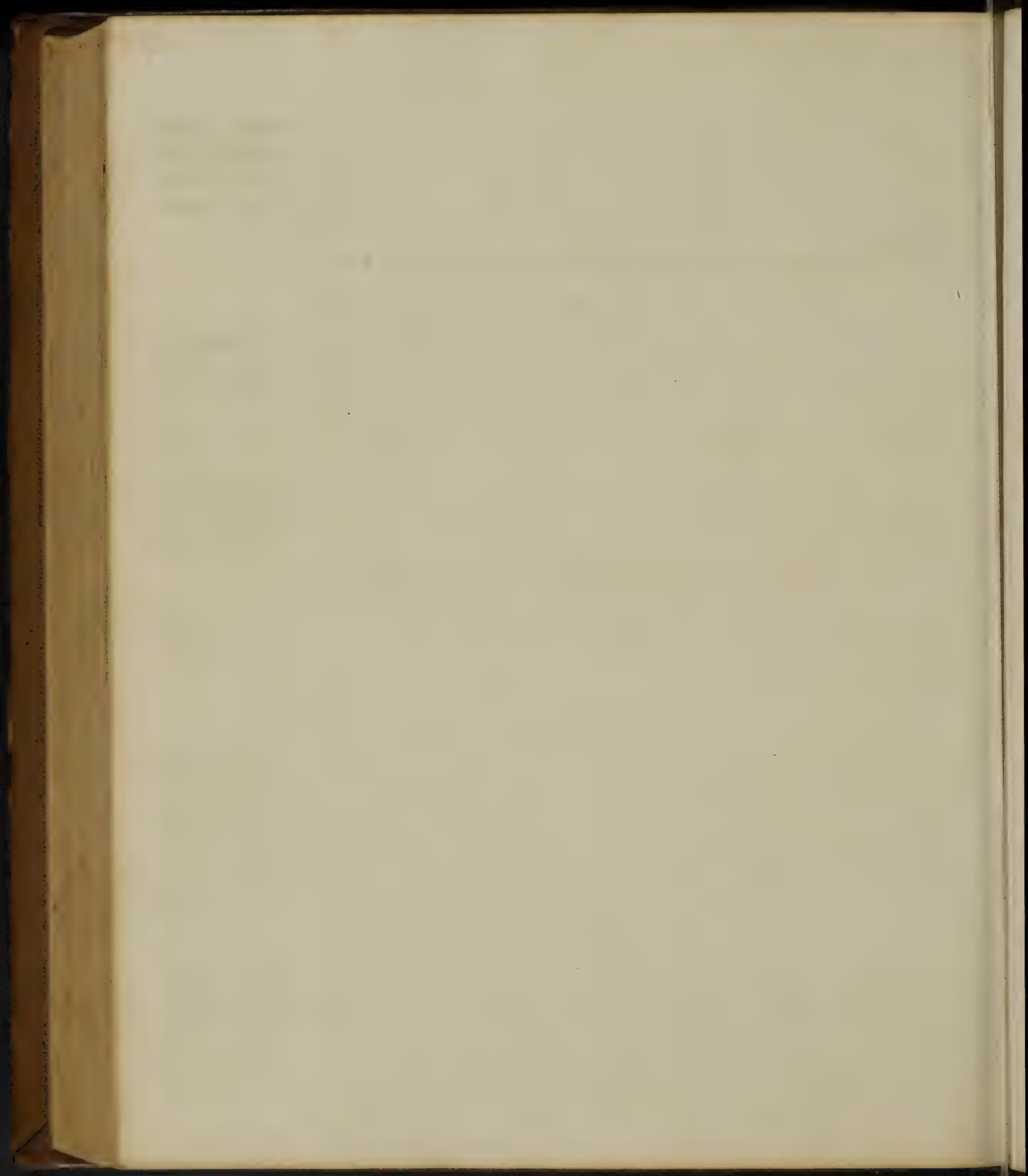
So at C.E. is without Stat^o on the subject
 2 Bull 2303 an author may maintain this action agt. such
 as publish his works without his permission. Any

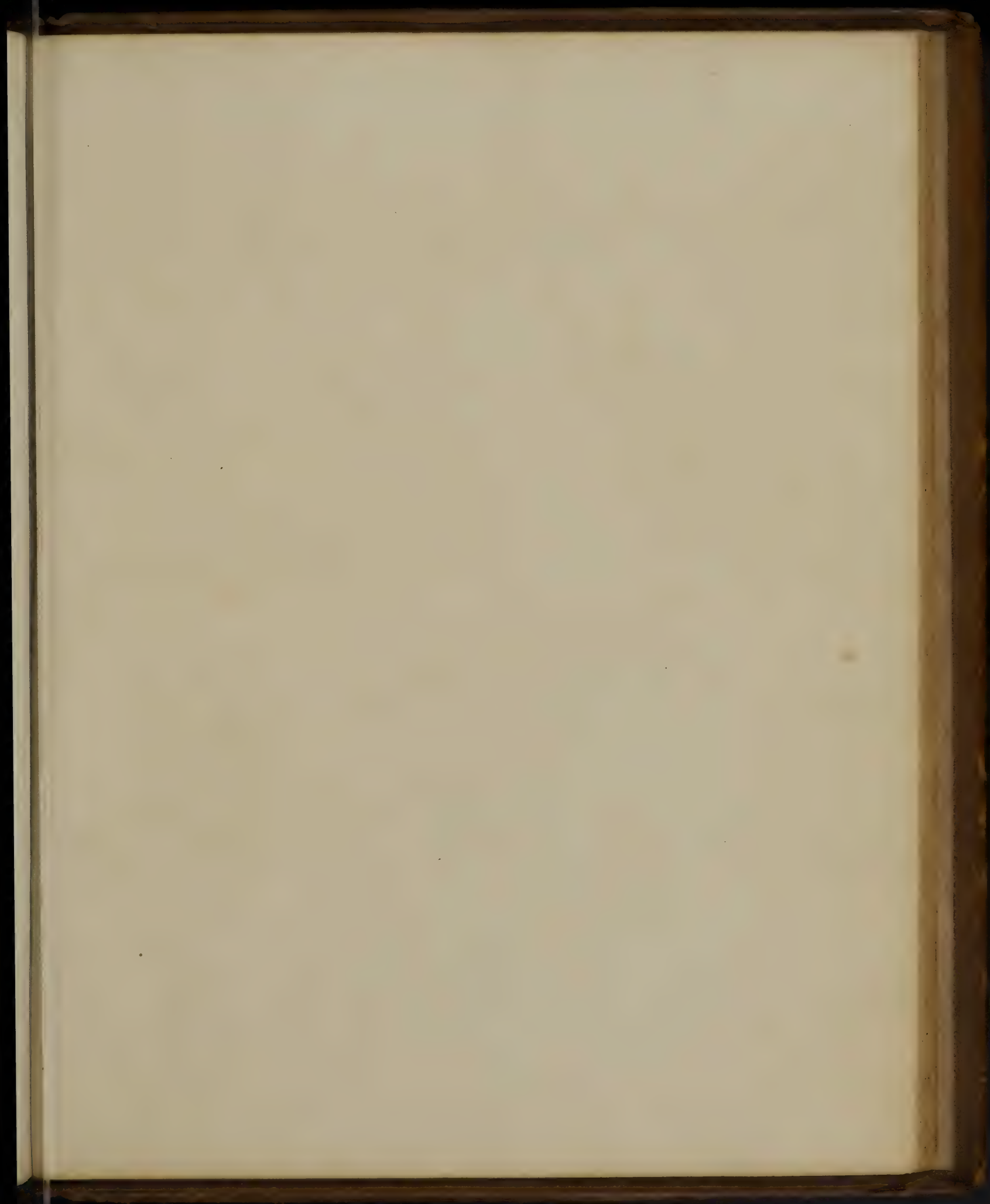
Any person employing another is answerable
for his misconduct or neglect in doing the business
and is therefore liable in this action. (ie when the
injury is remediable by care. otherwise he is liable
in trespass or any action adapted to the injury.)
 Esp. 600
 25 Reg. 739
 Salk. 441
 King. 1083

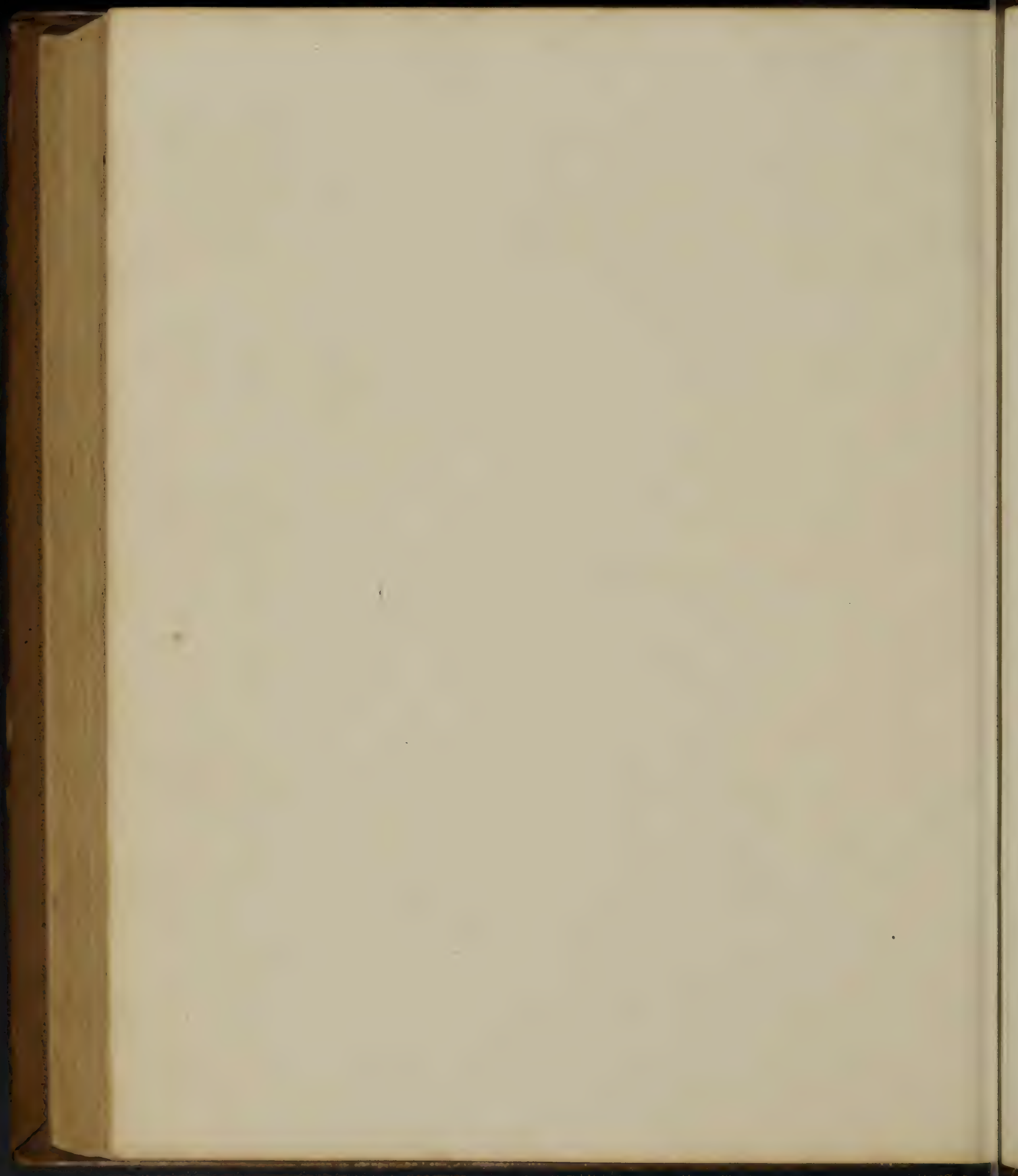
It lies for obstructing process, & if an Officer
is prevented by a stranger from executing a process
as by removing the goods of the original Debt. -
taking the original Debt. doct. Case lies for the
Officer or the Plt in the process, can in N. H. County.
 Cro. Eliz. 908
 5 Coke 93

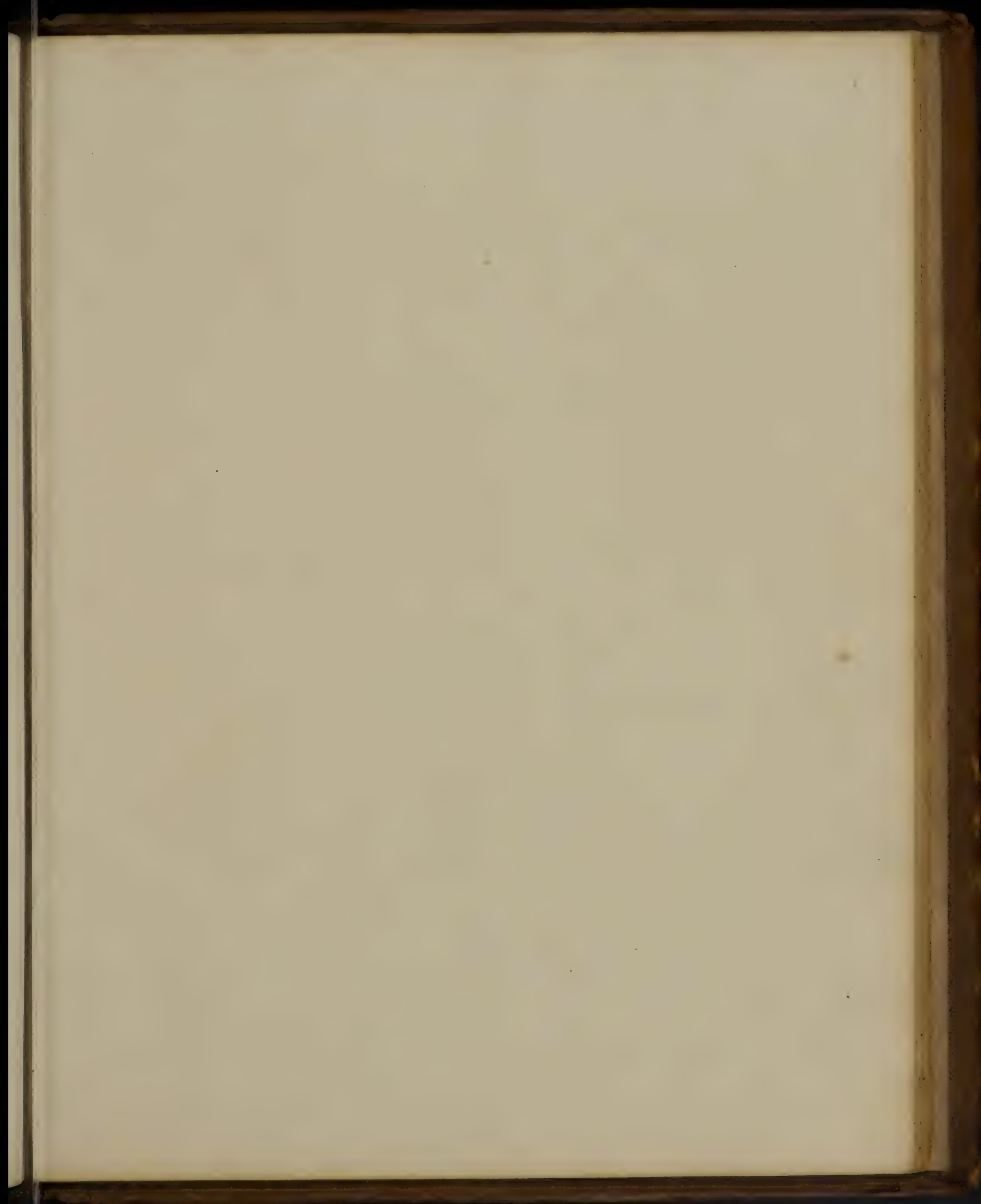
In declaring in Case. no precise form of
words is necessary as there are in specific or formal
actions. Gill. 1703
15 Reg. 641

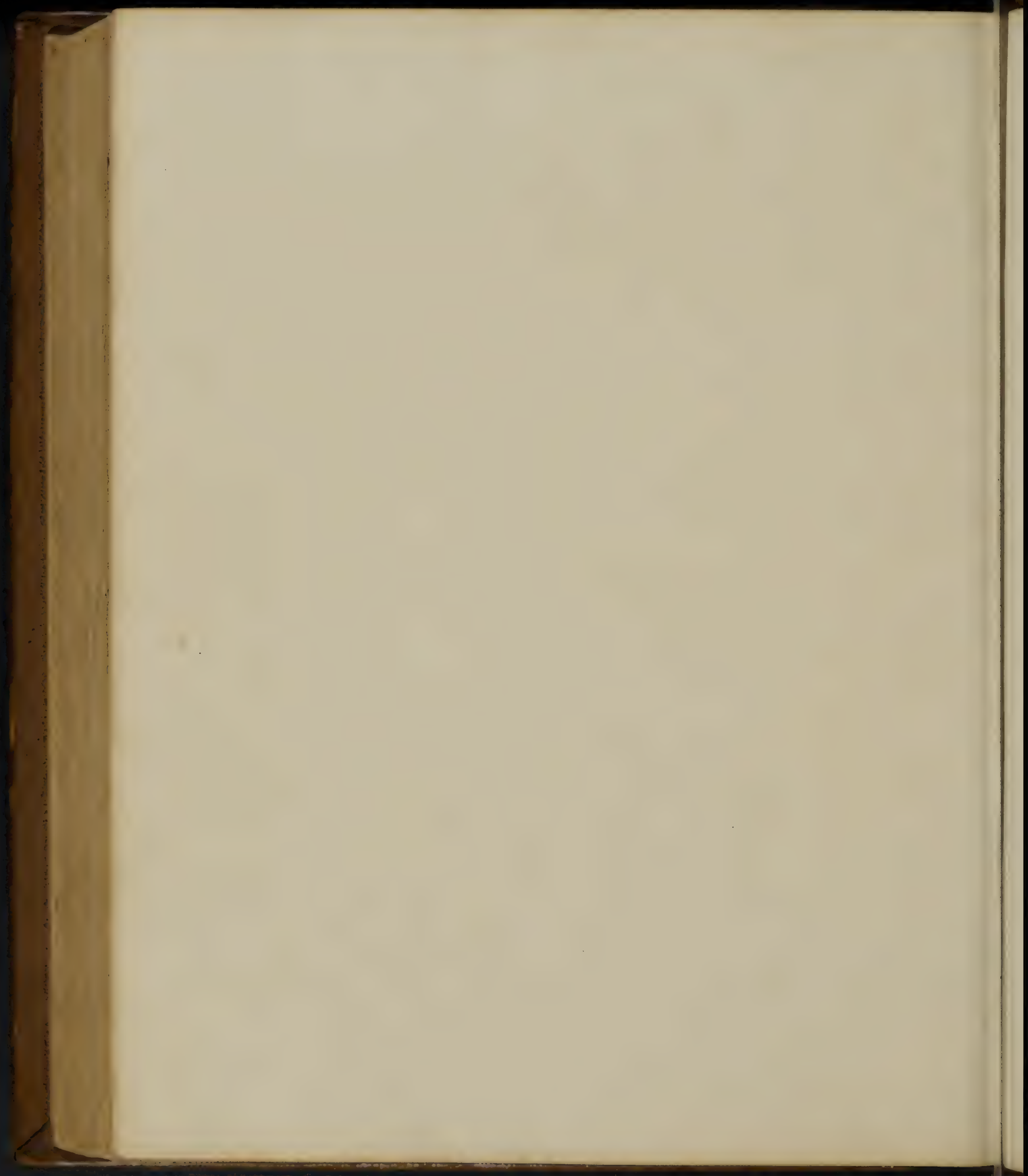
As to the actions per quod - see Baron &
Tenne. Parent & Child. Master & Servant

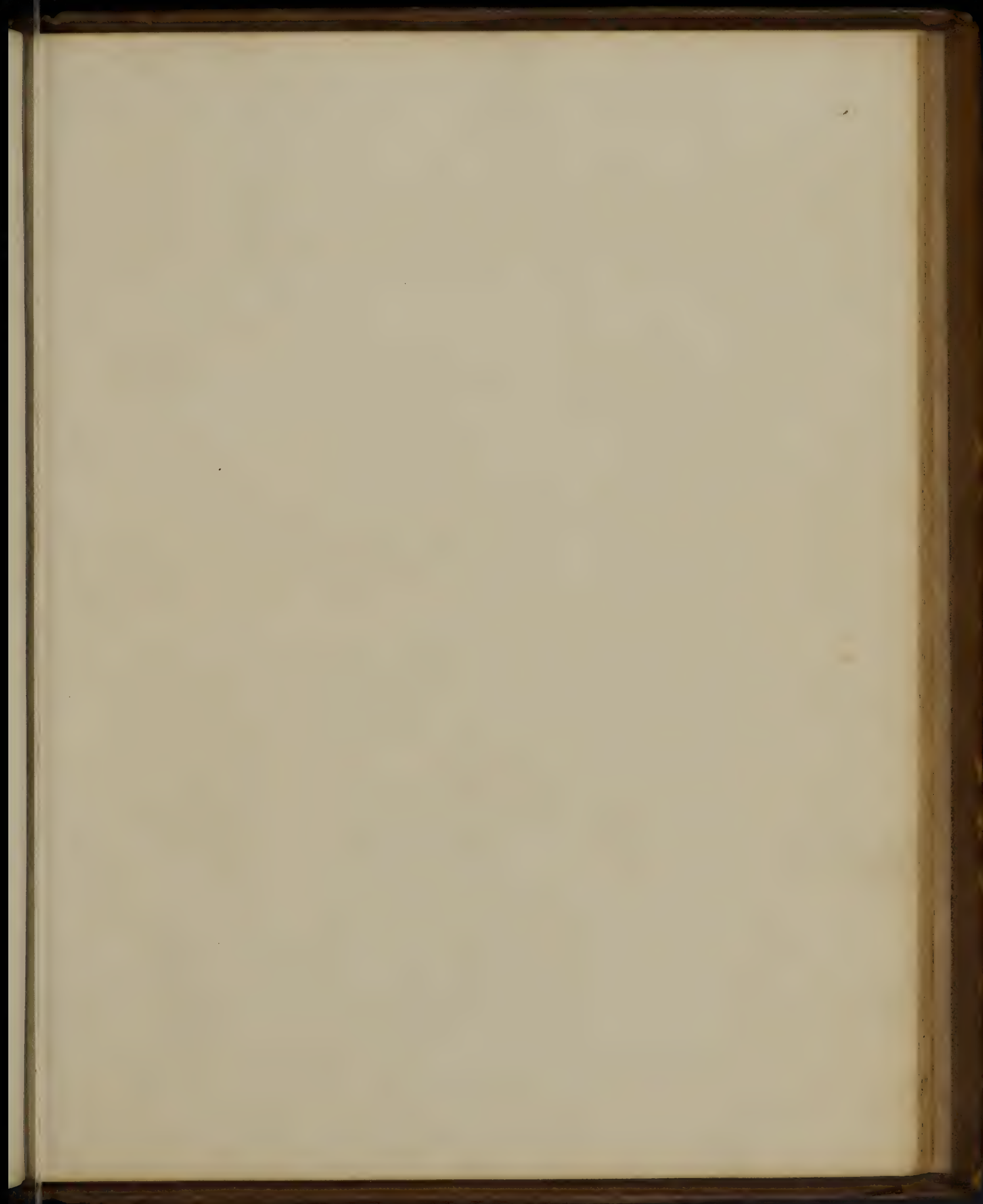


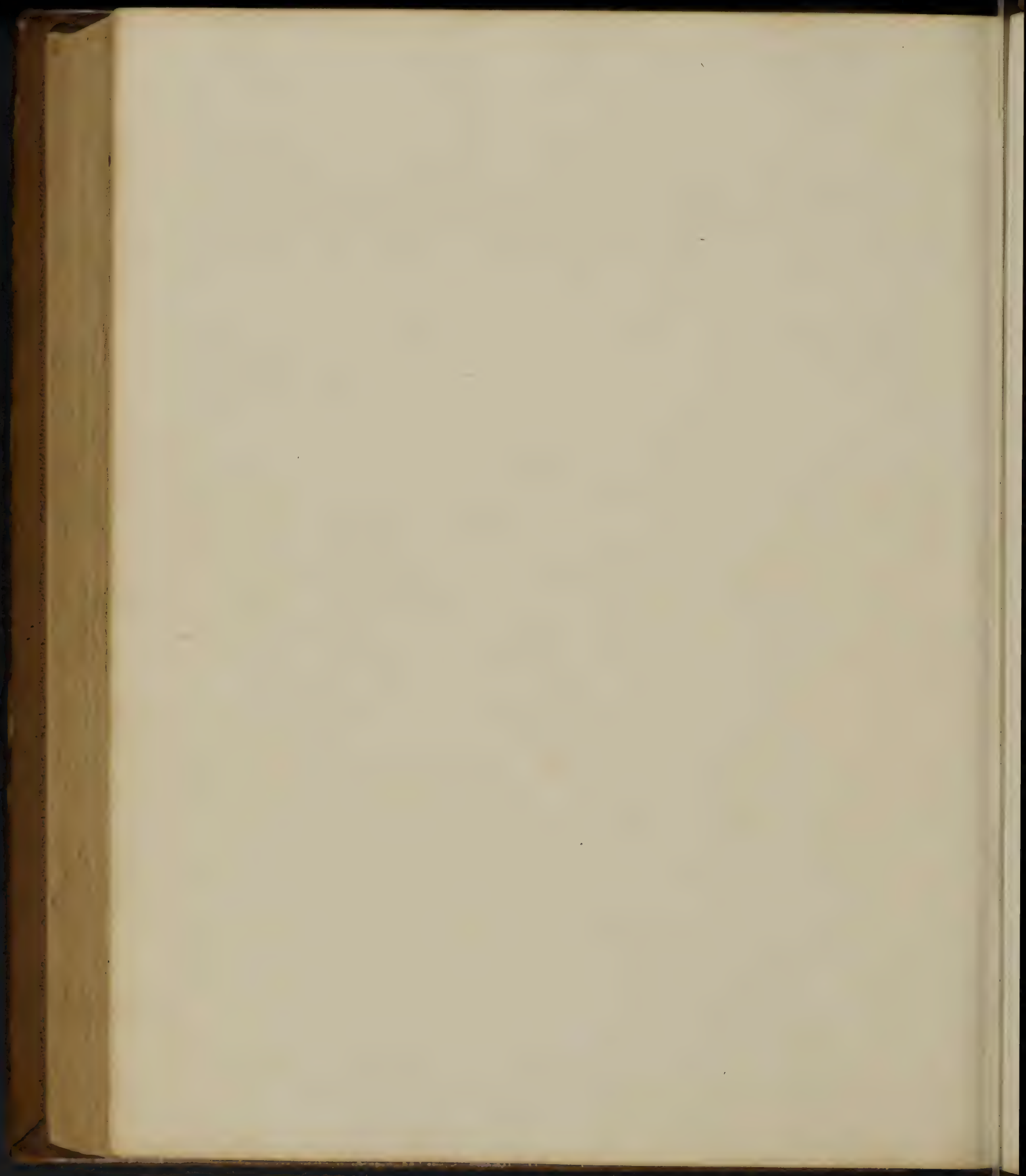


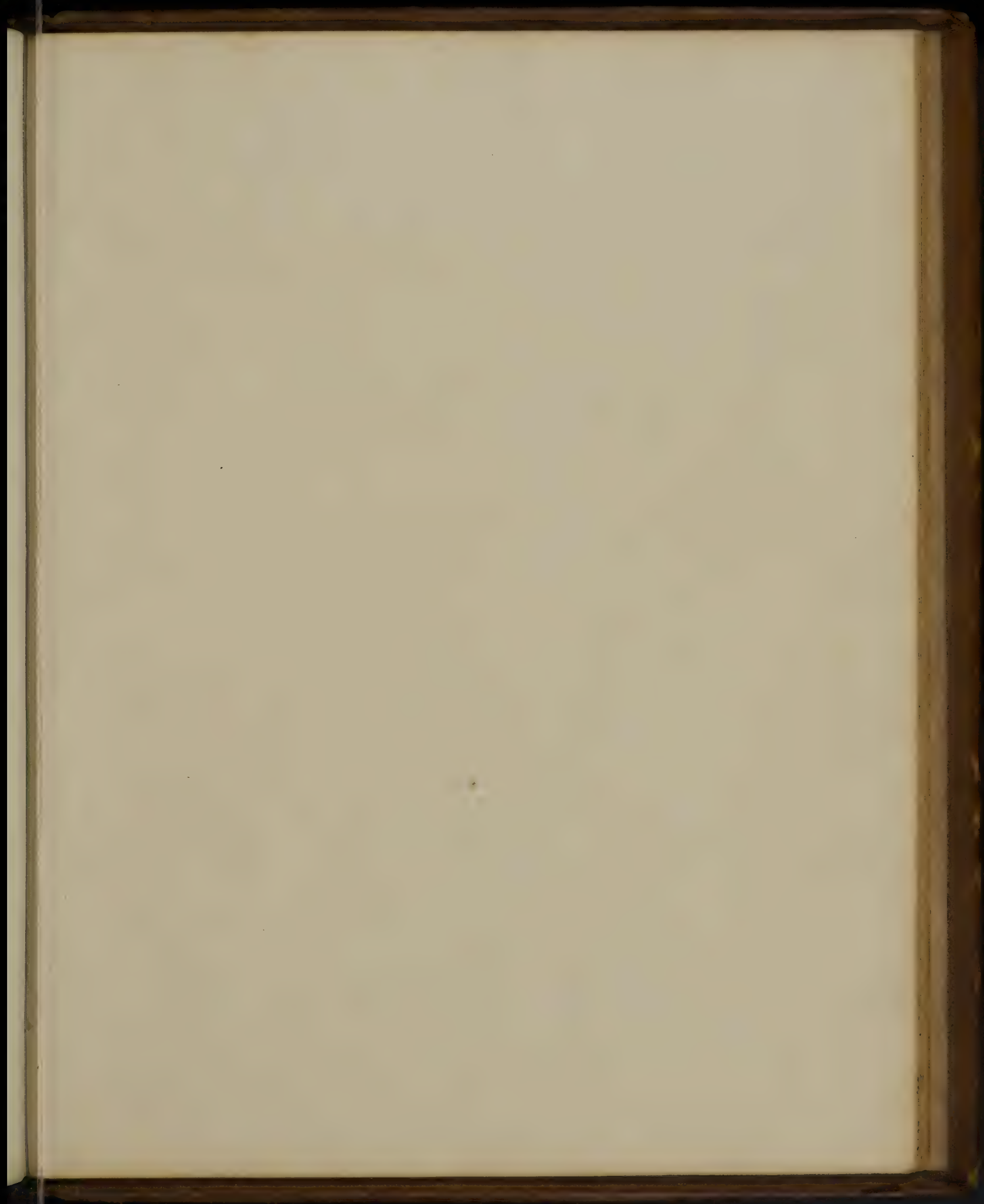


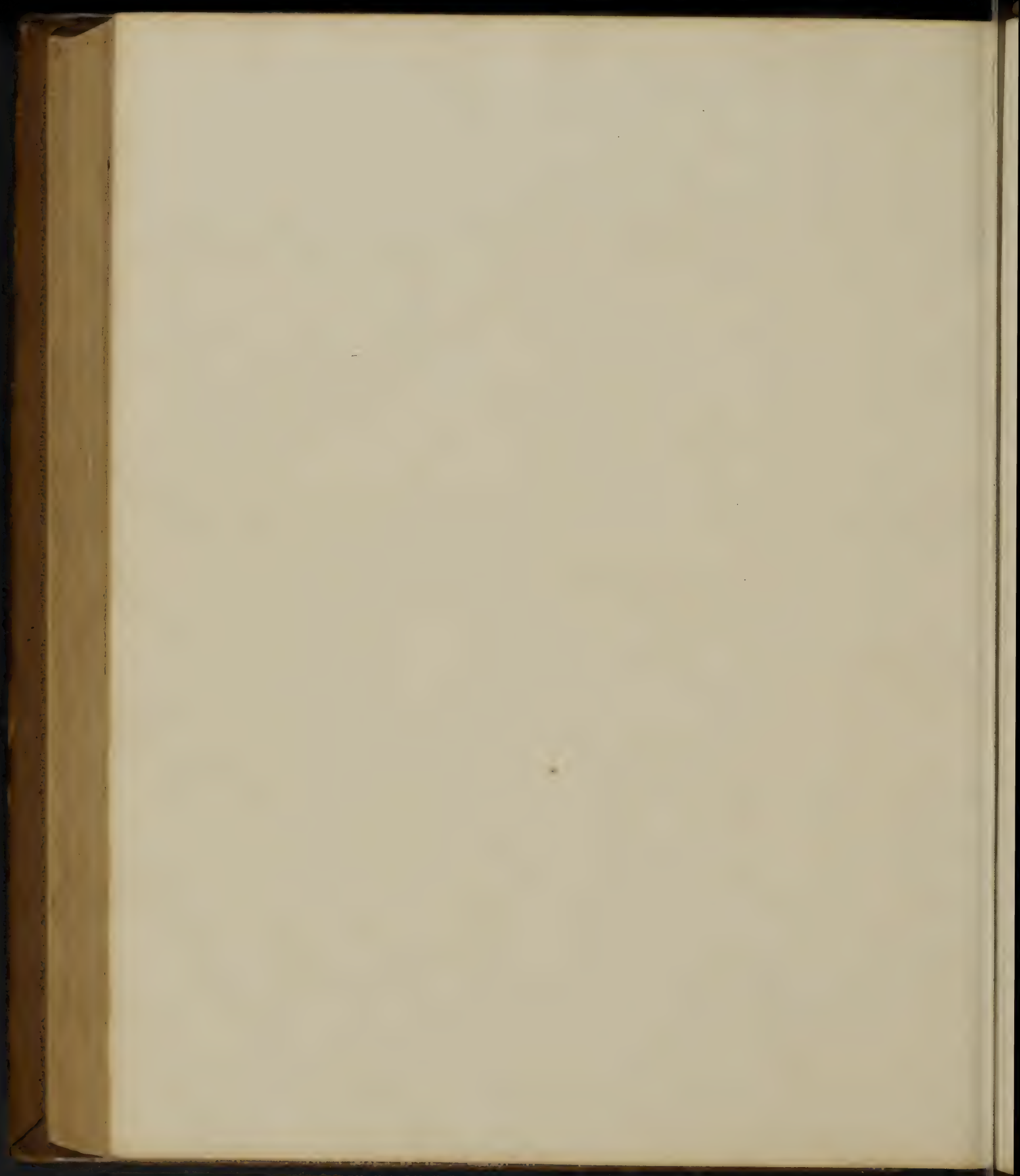


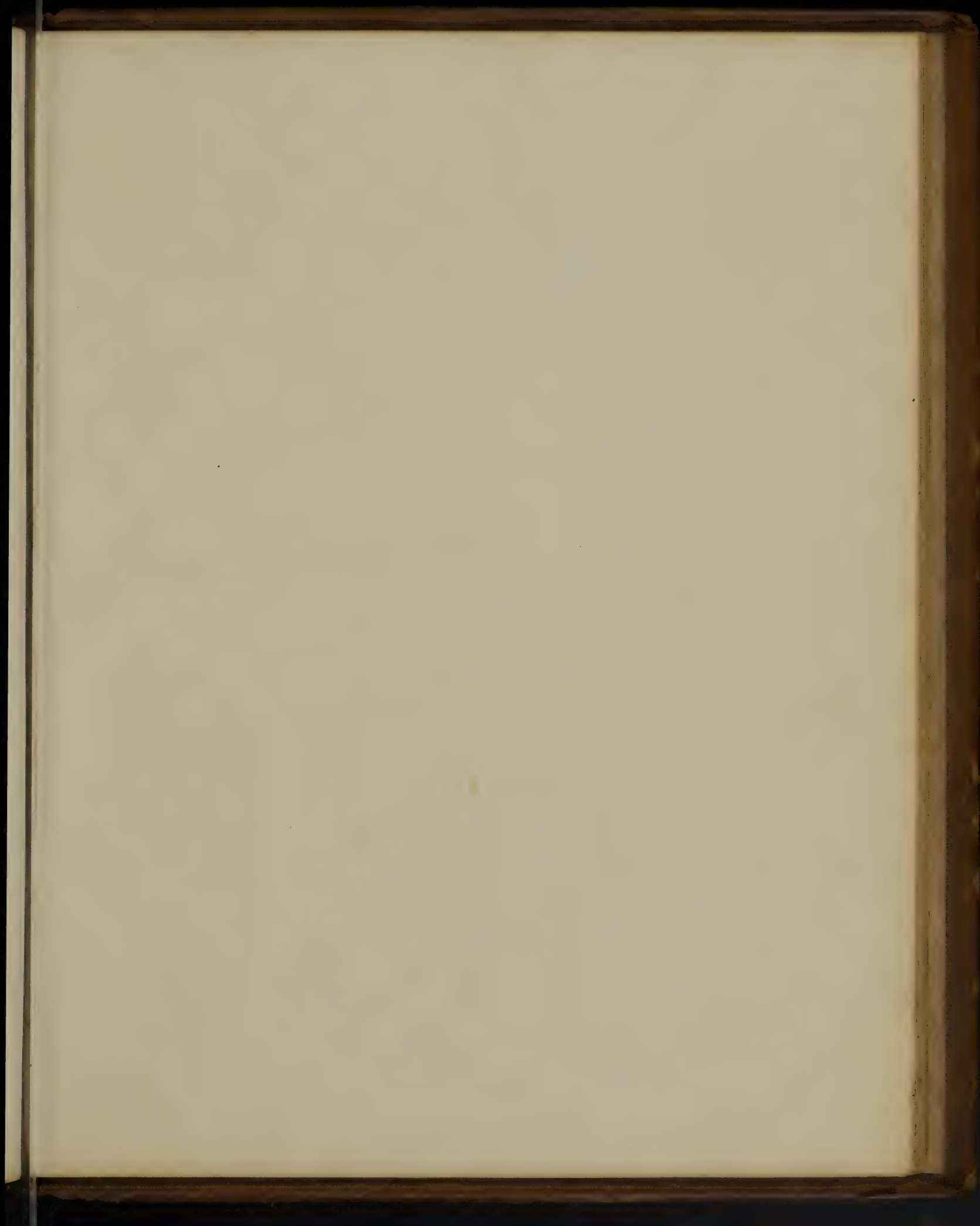


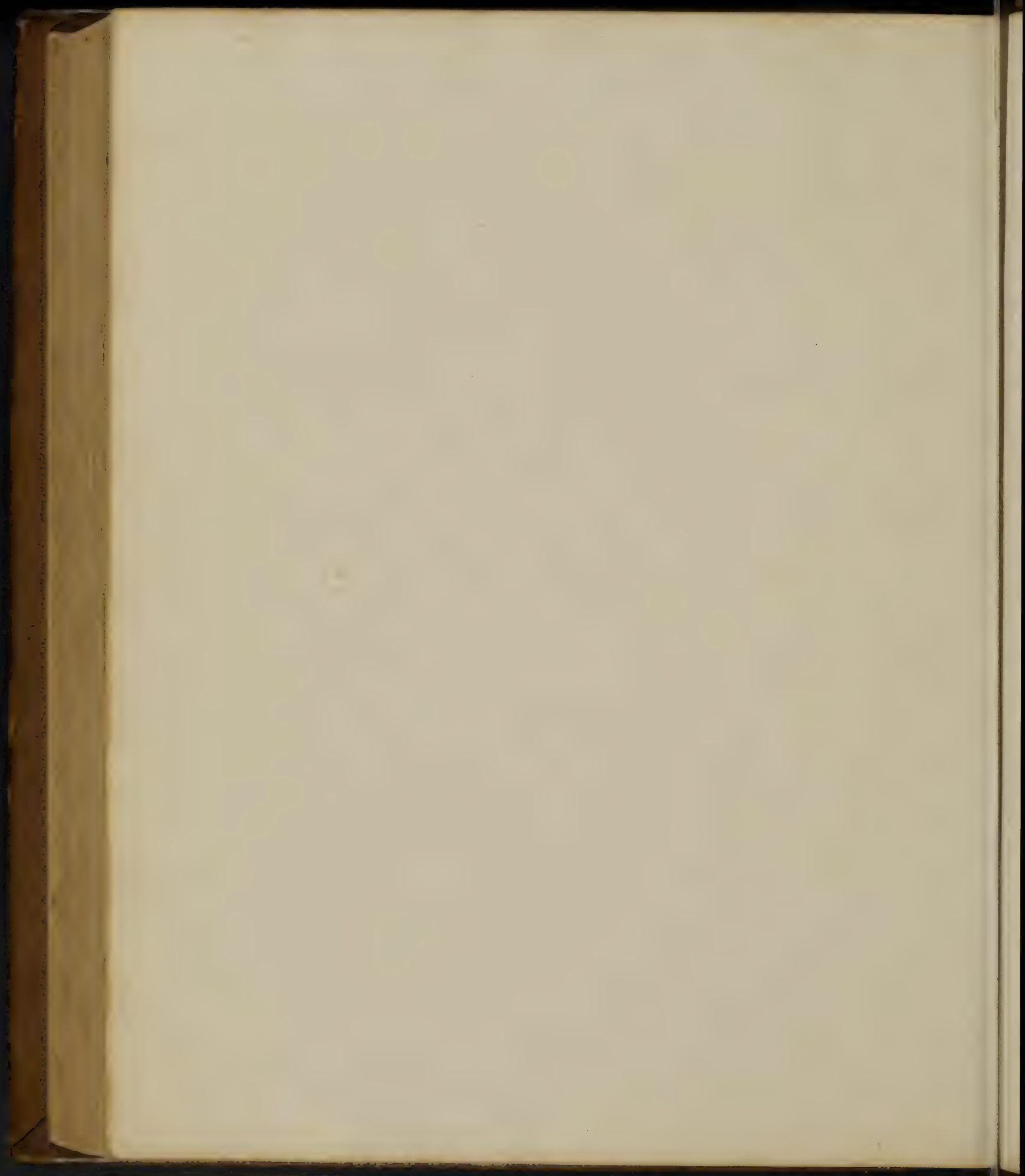


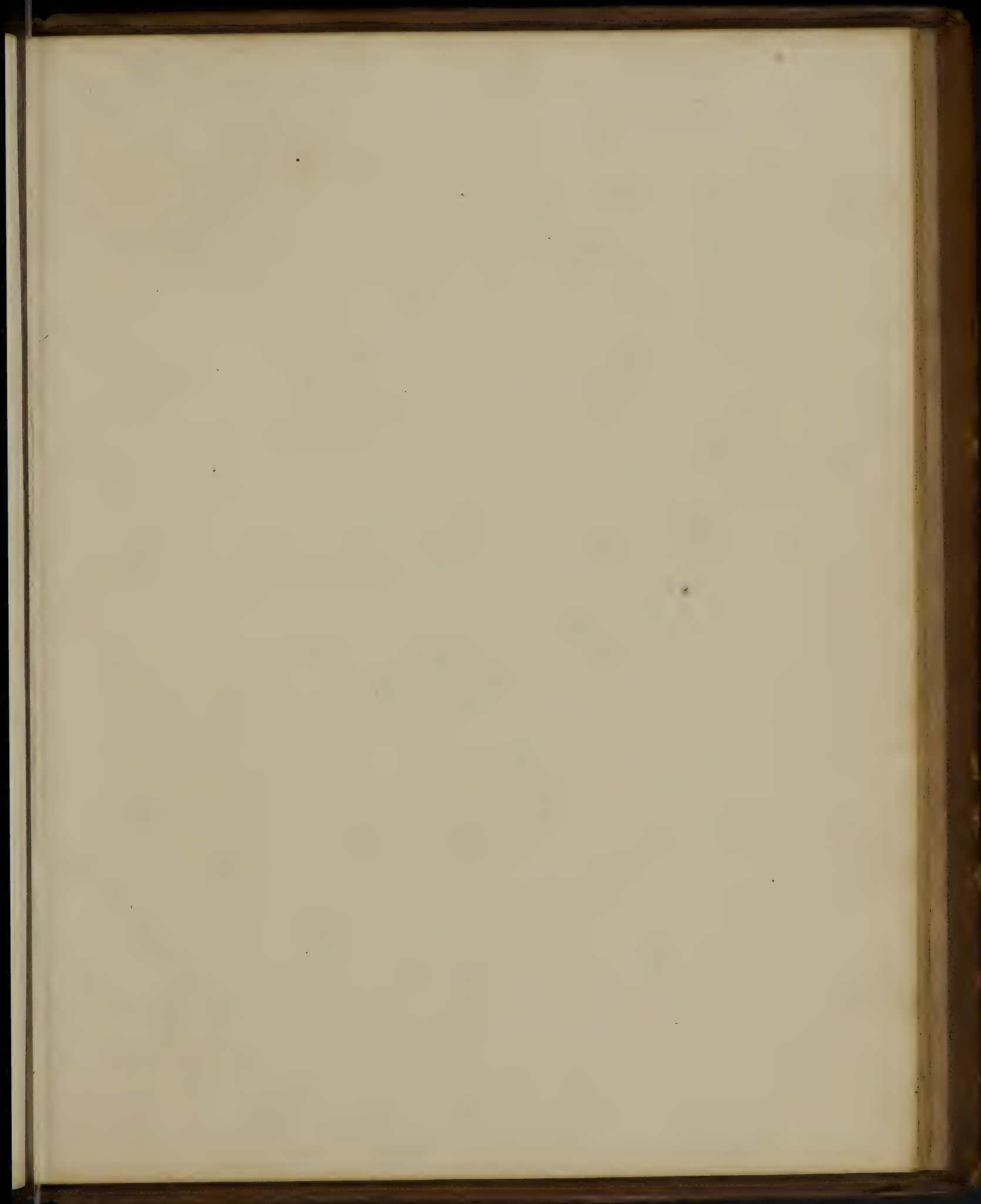


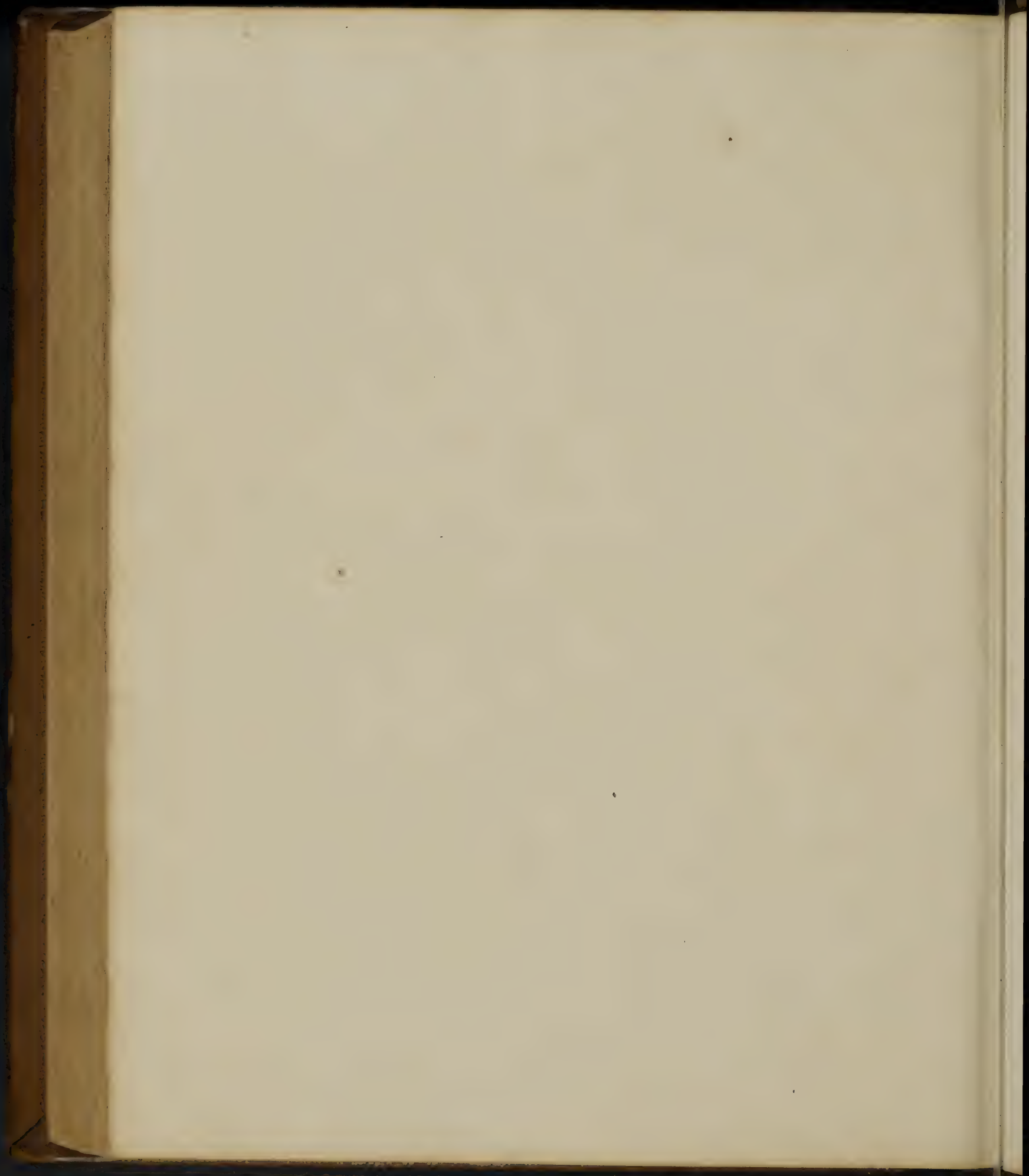


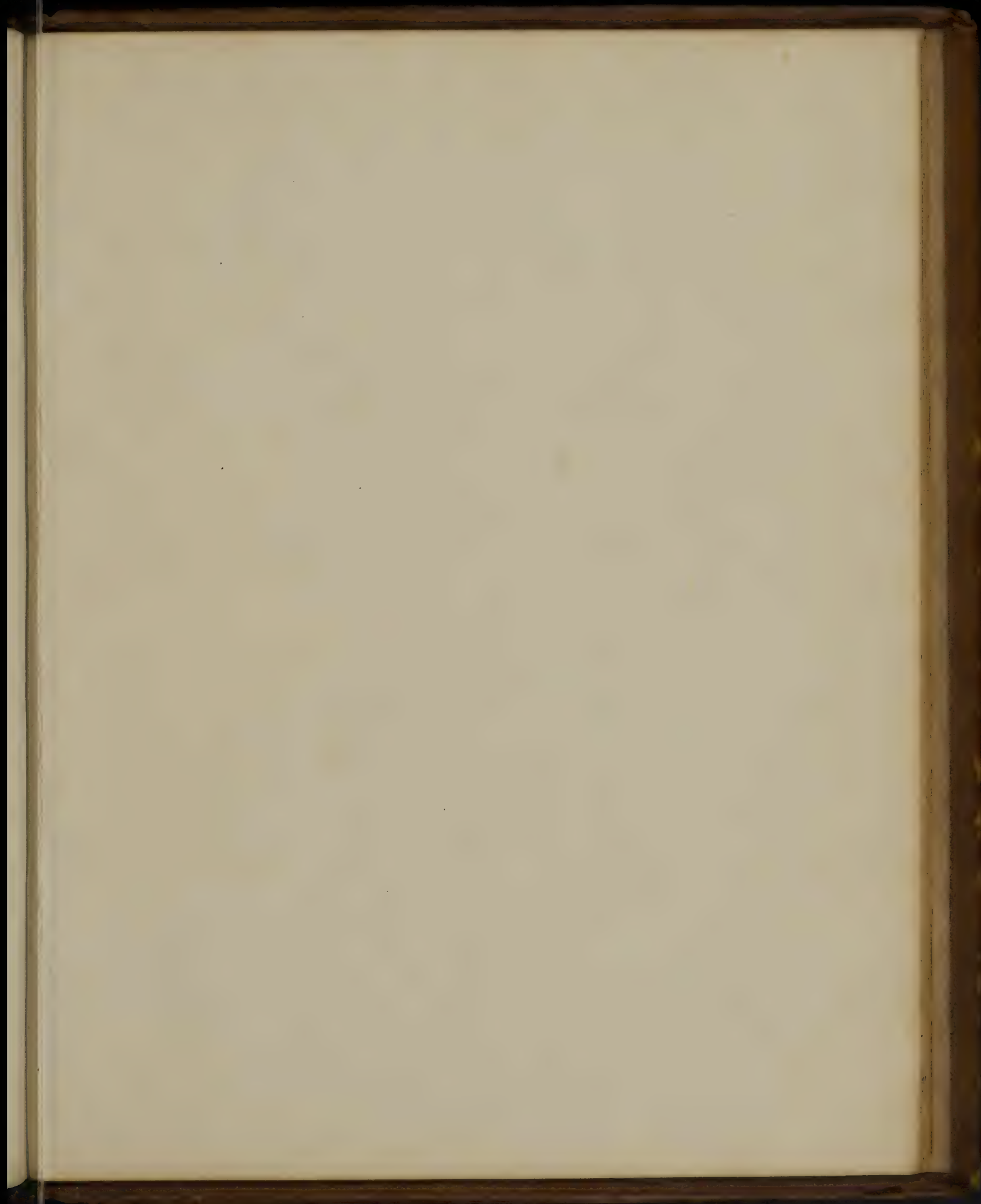


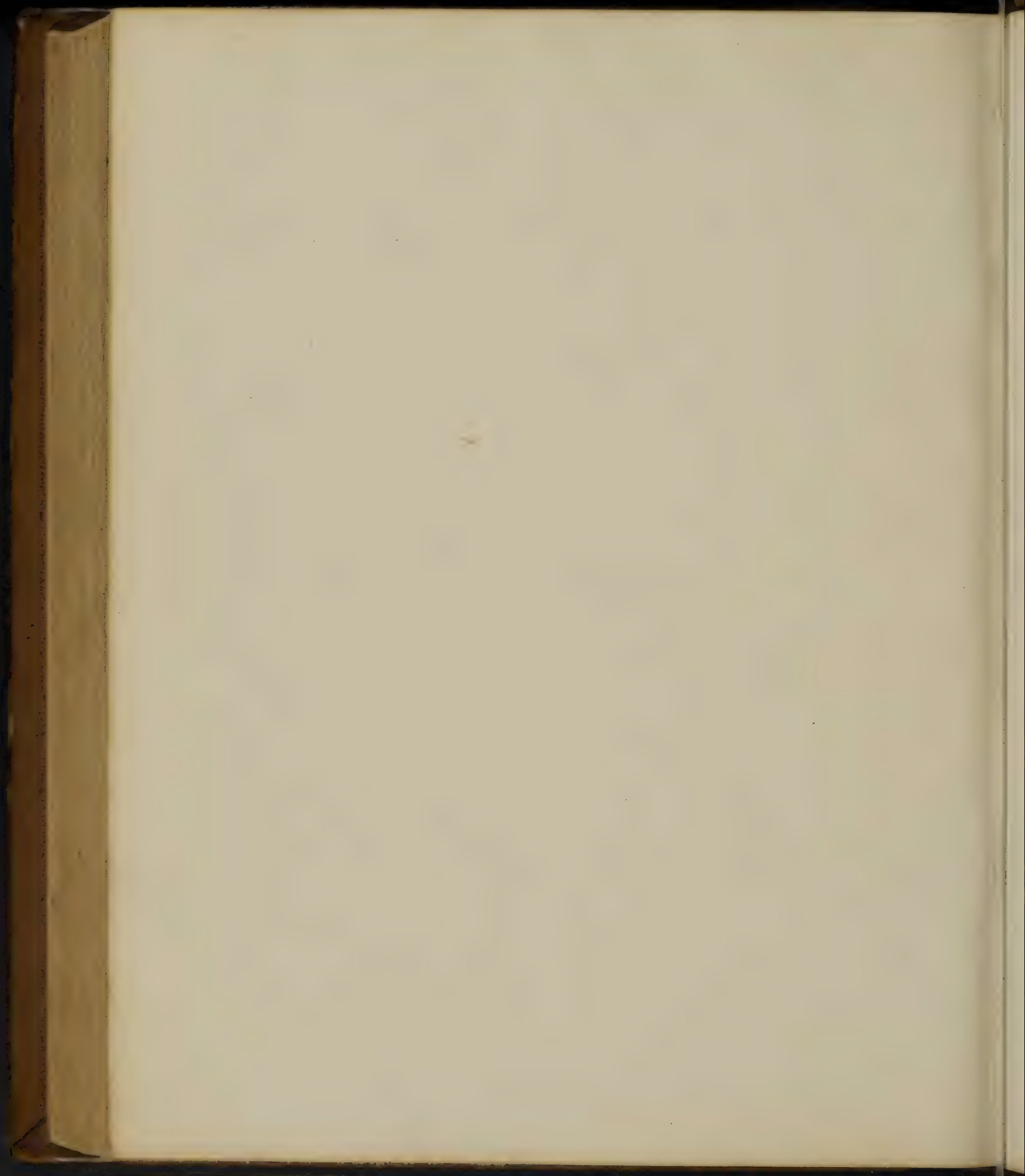


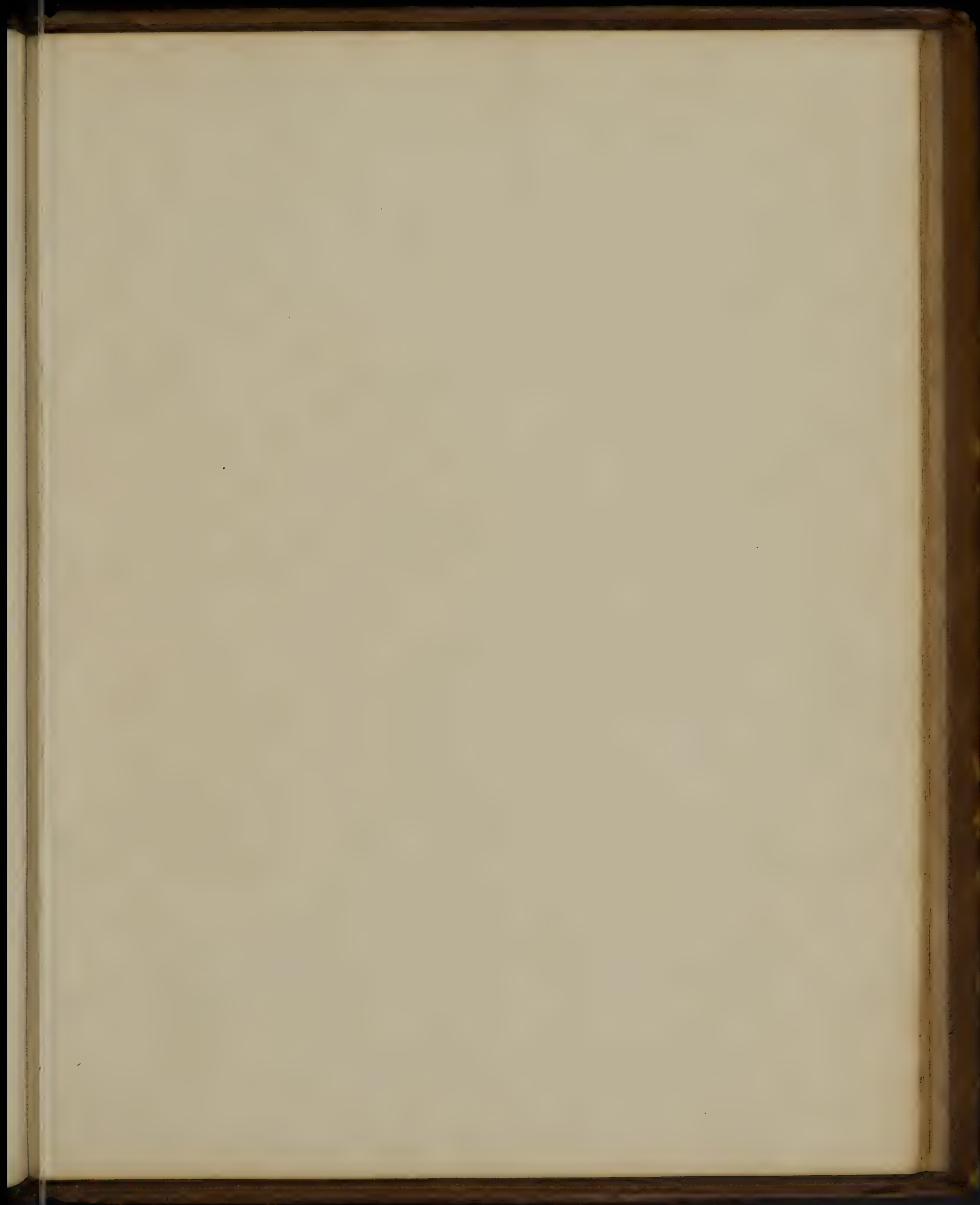


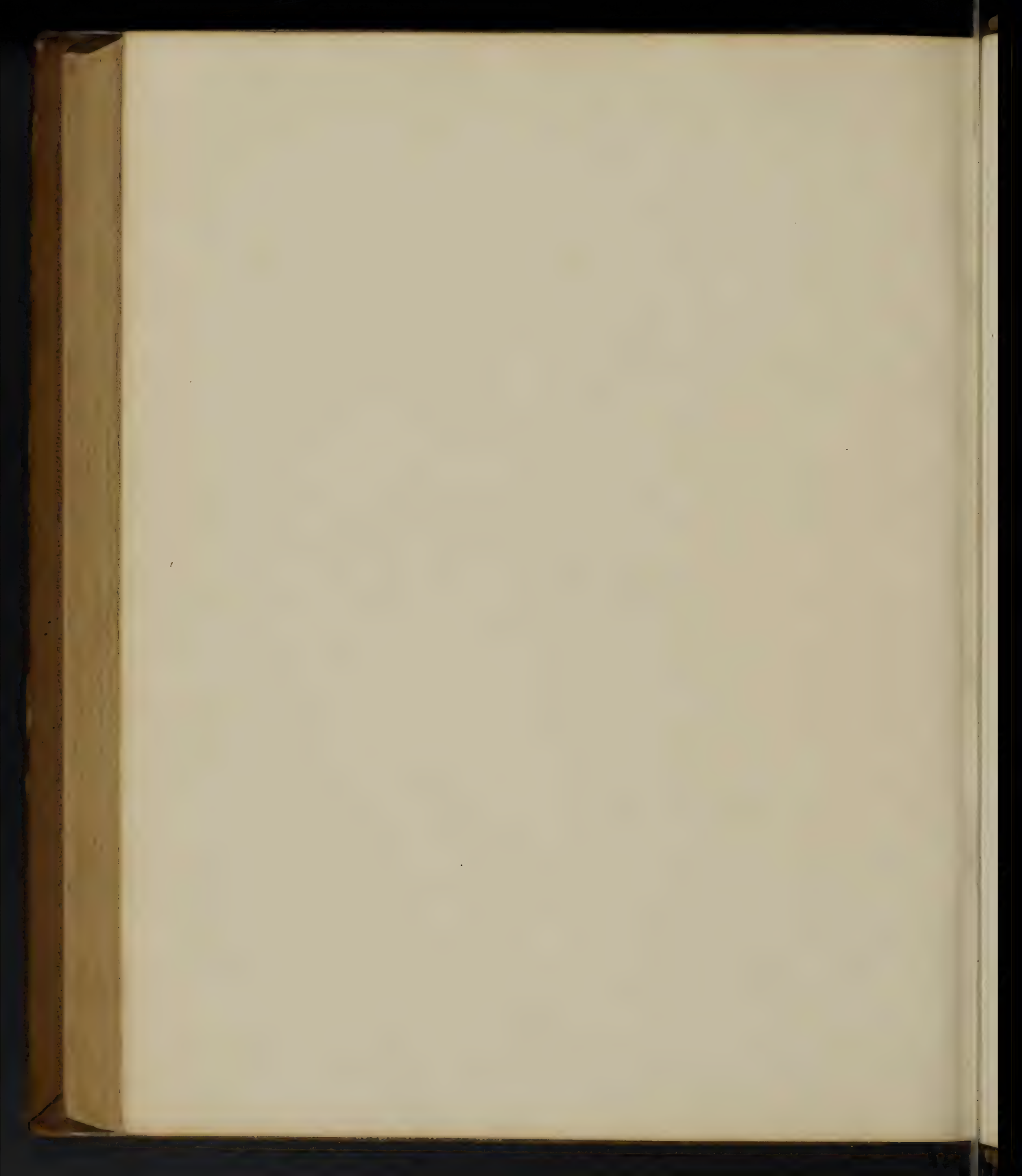


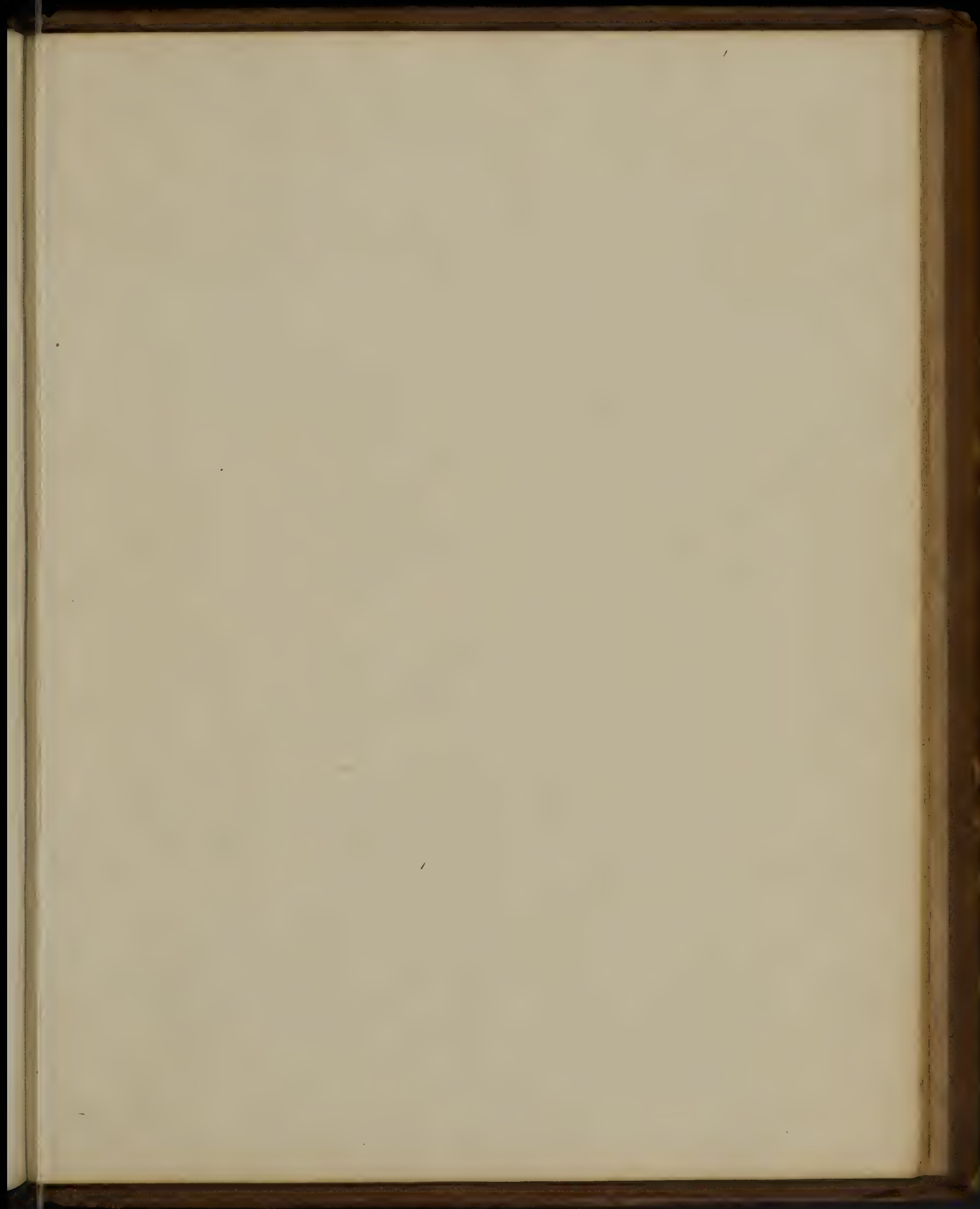


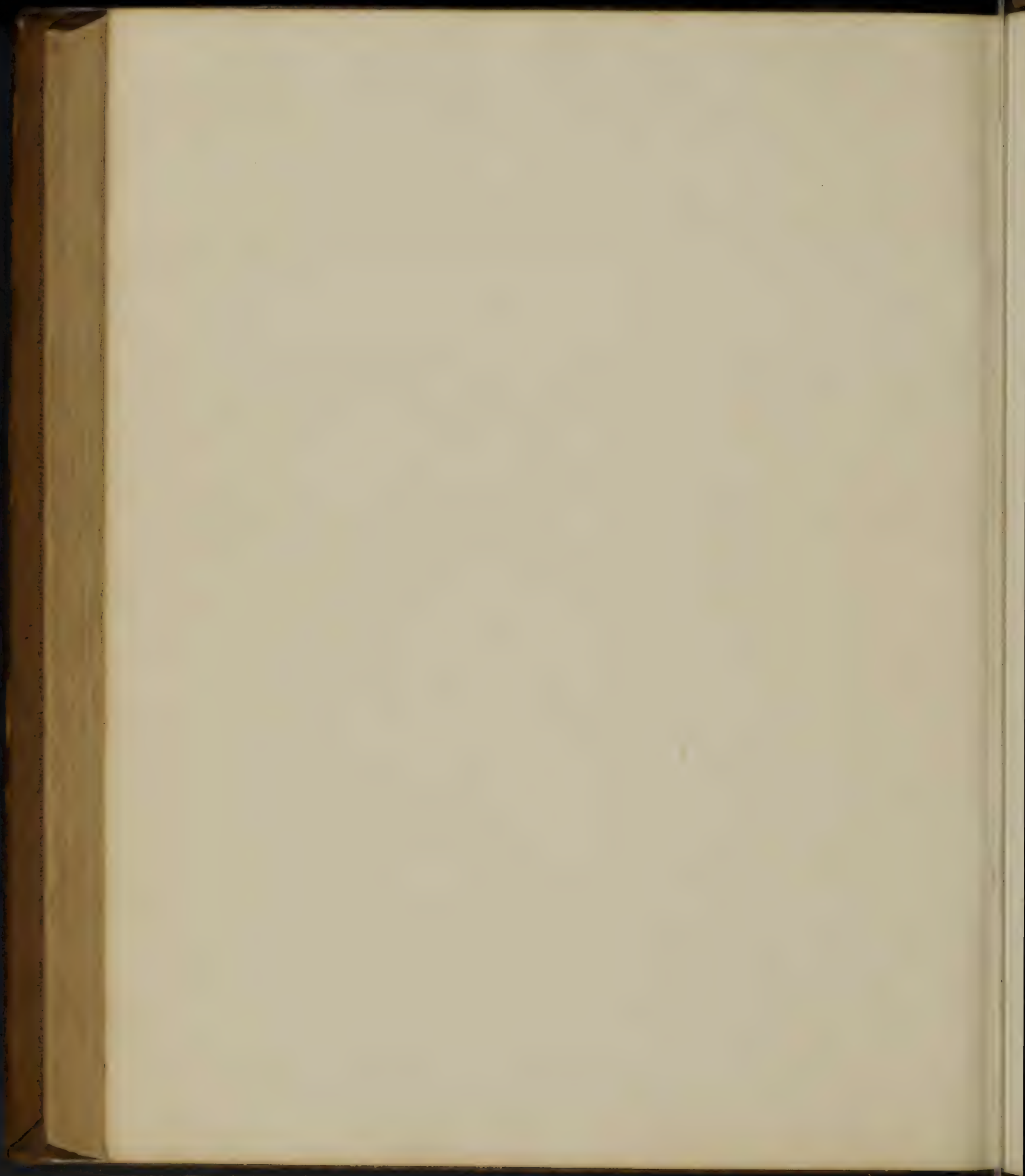


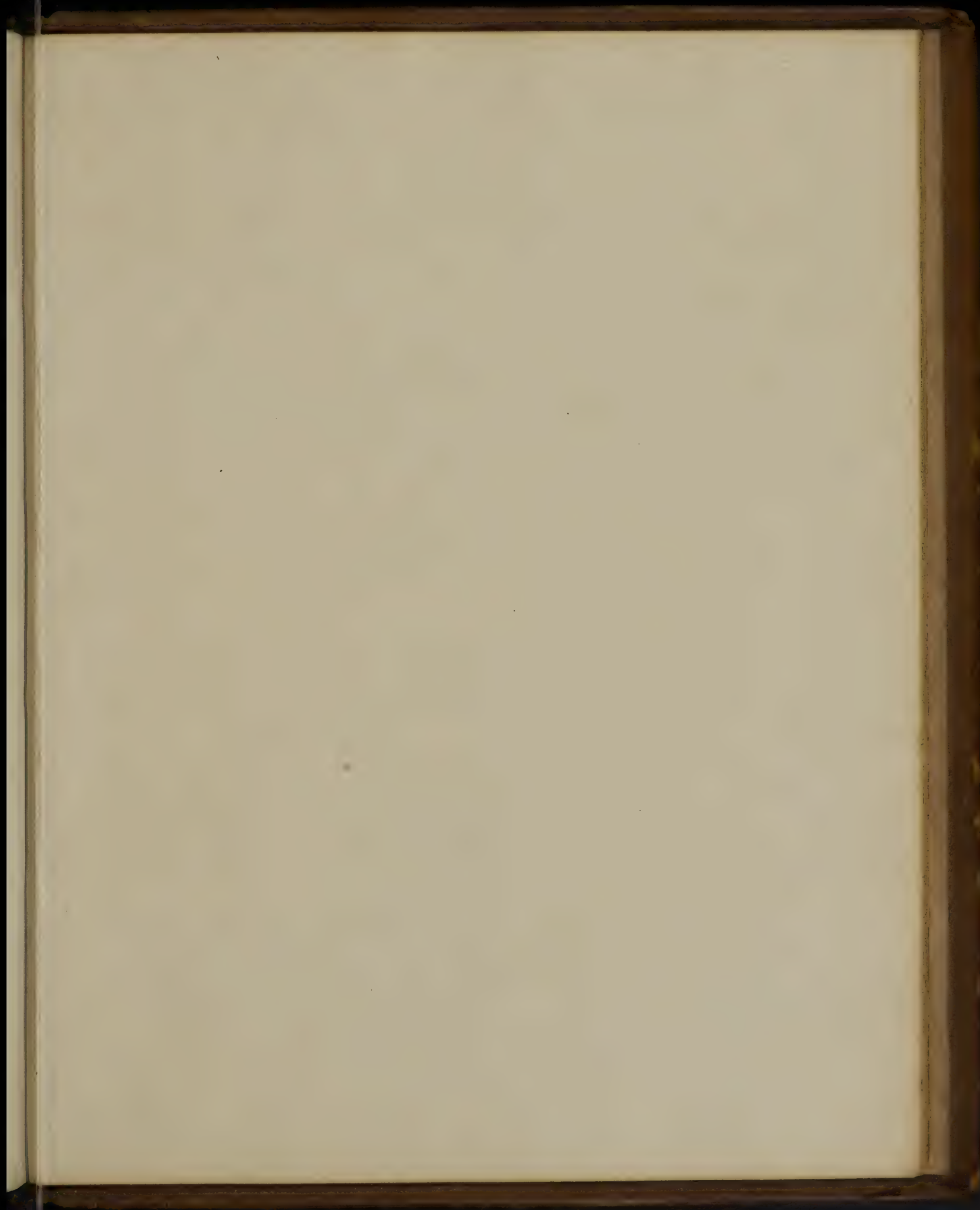


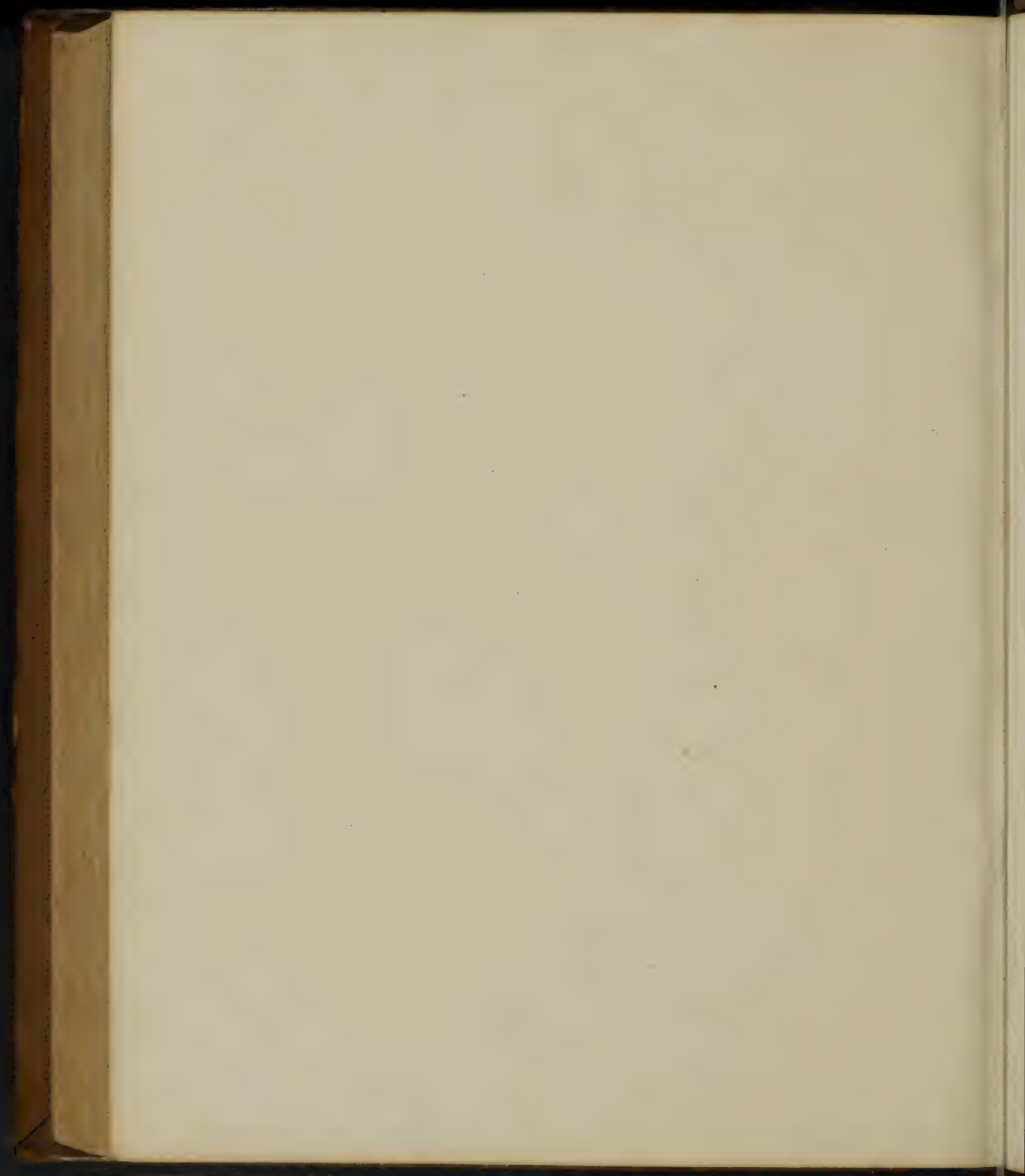


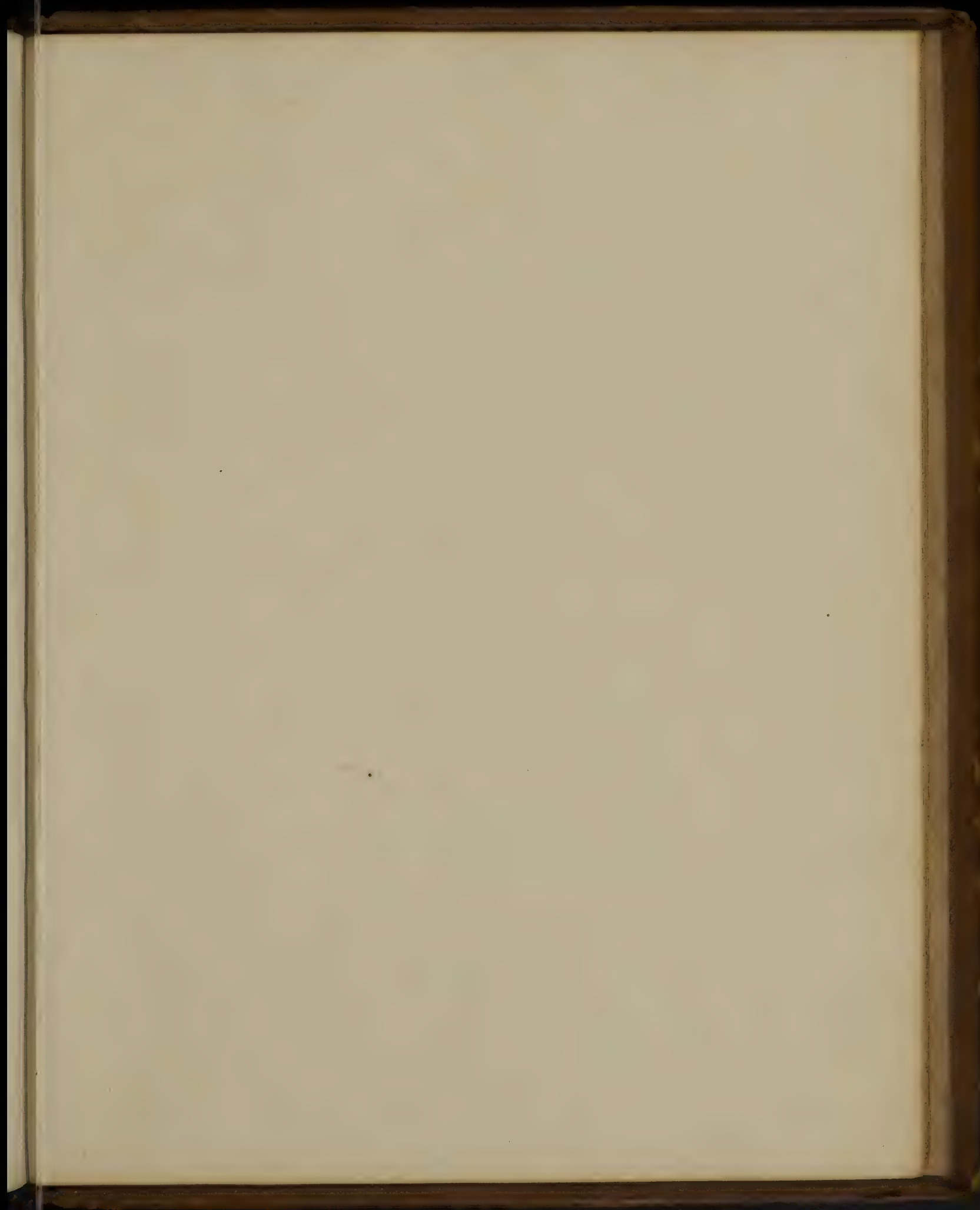


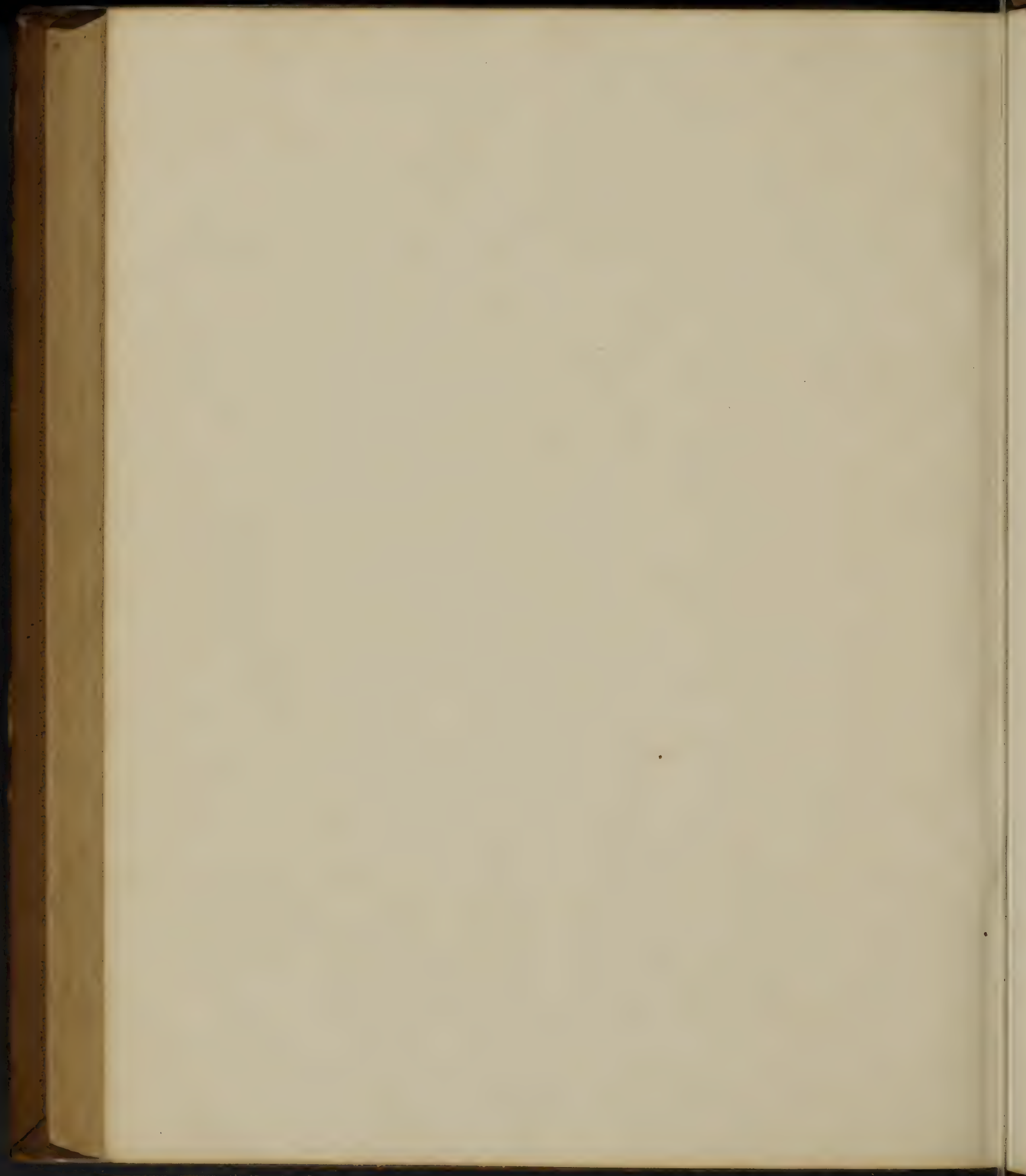


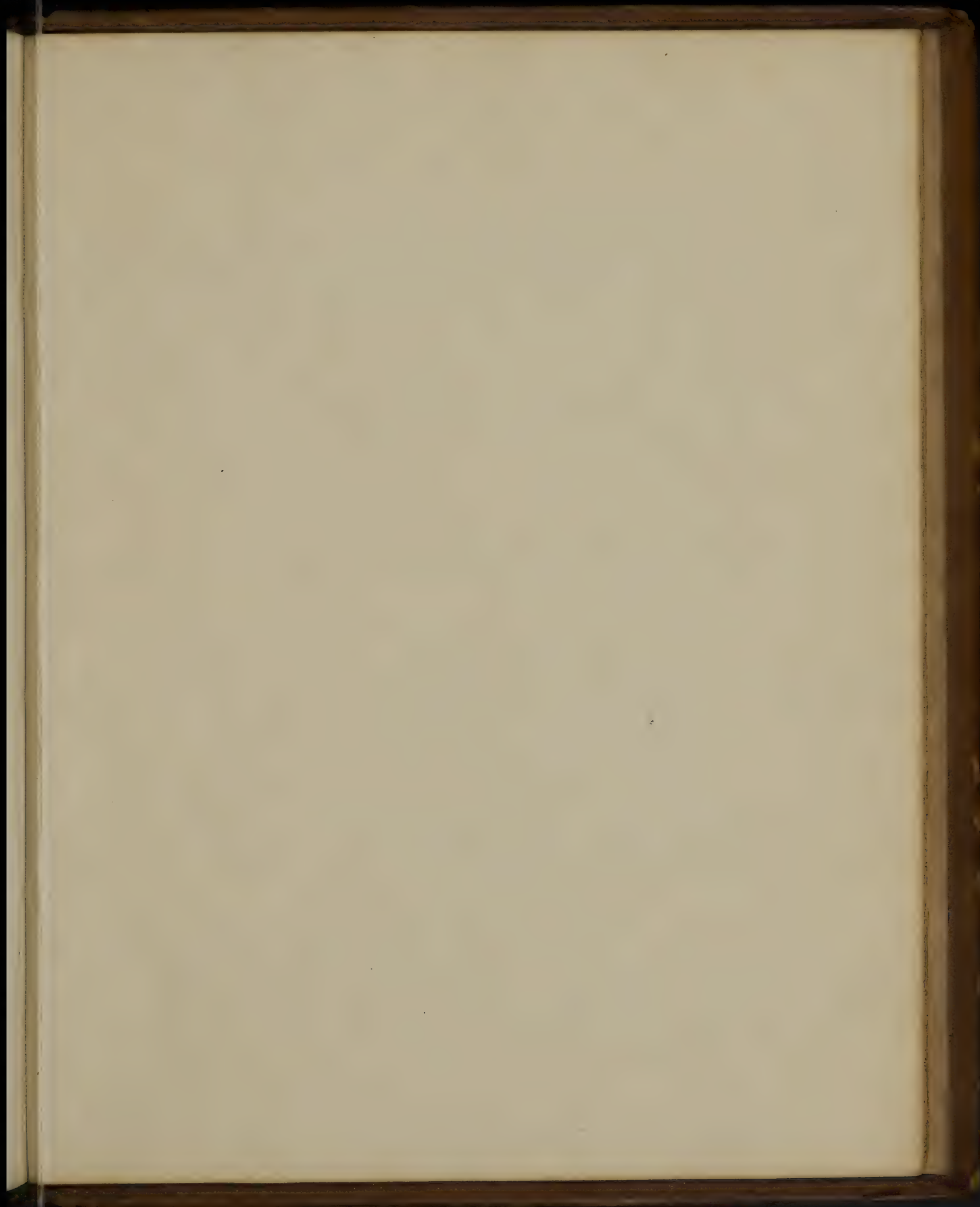


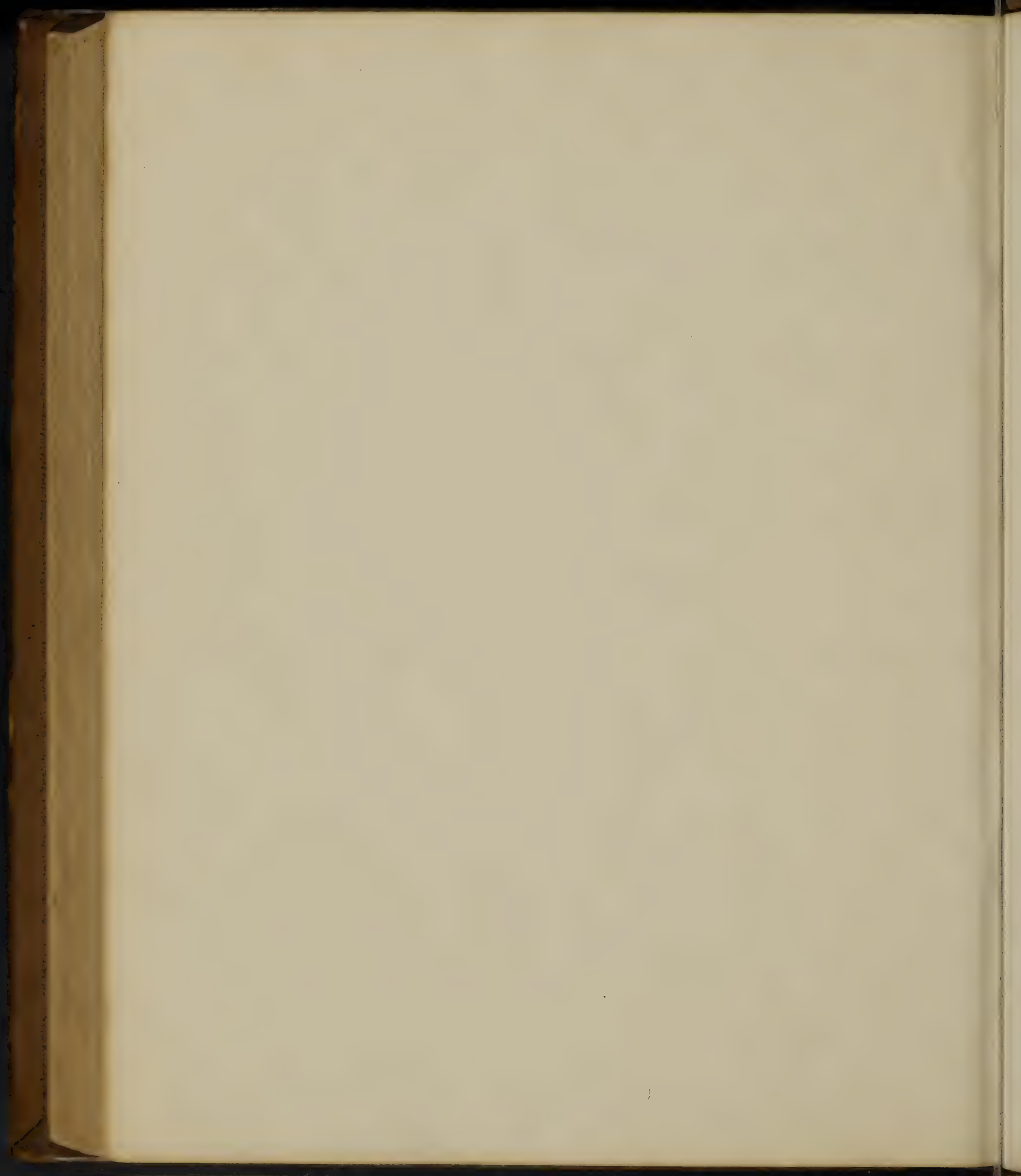


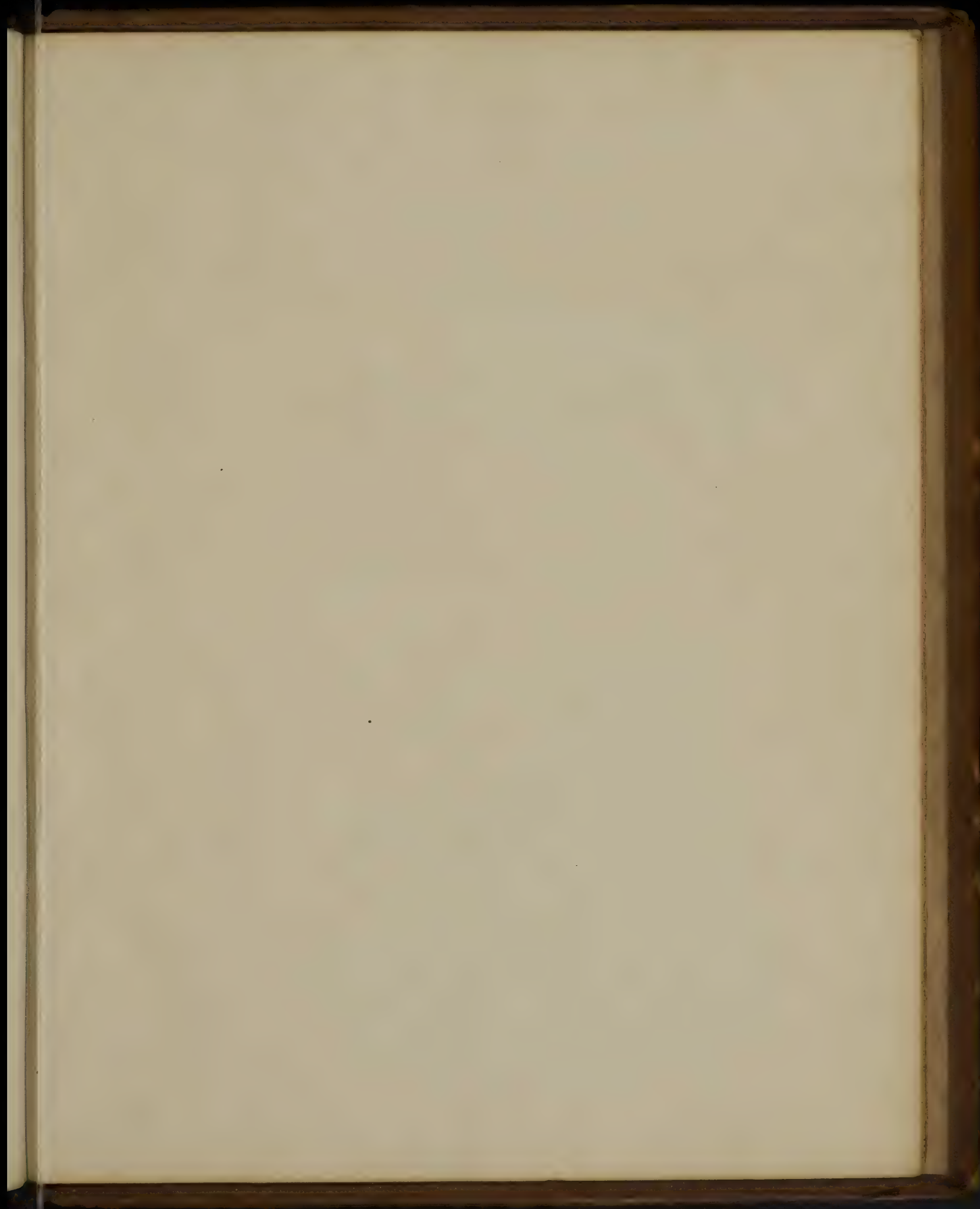


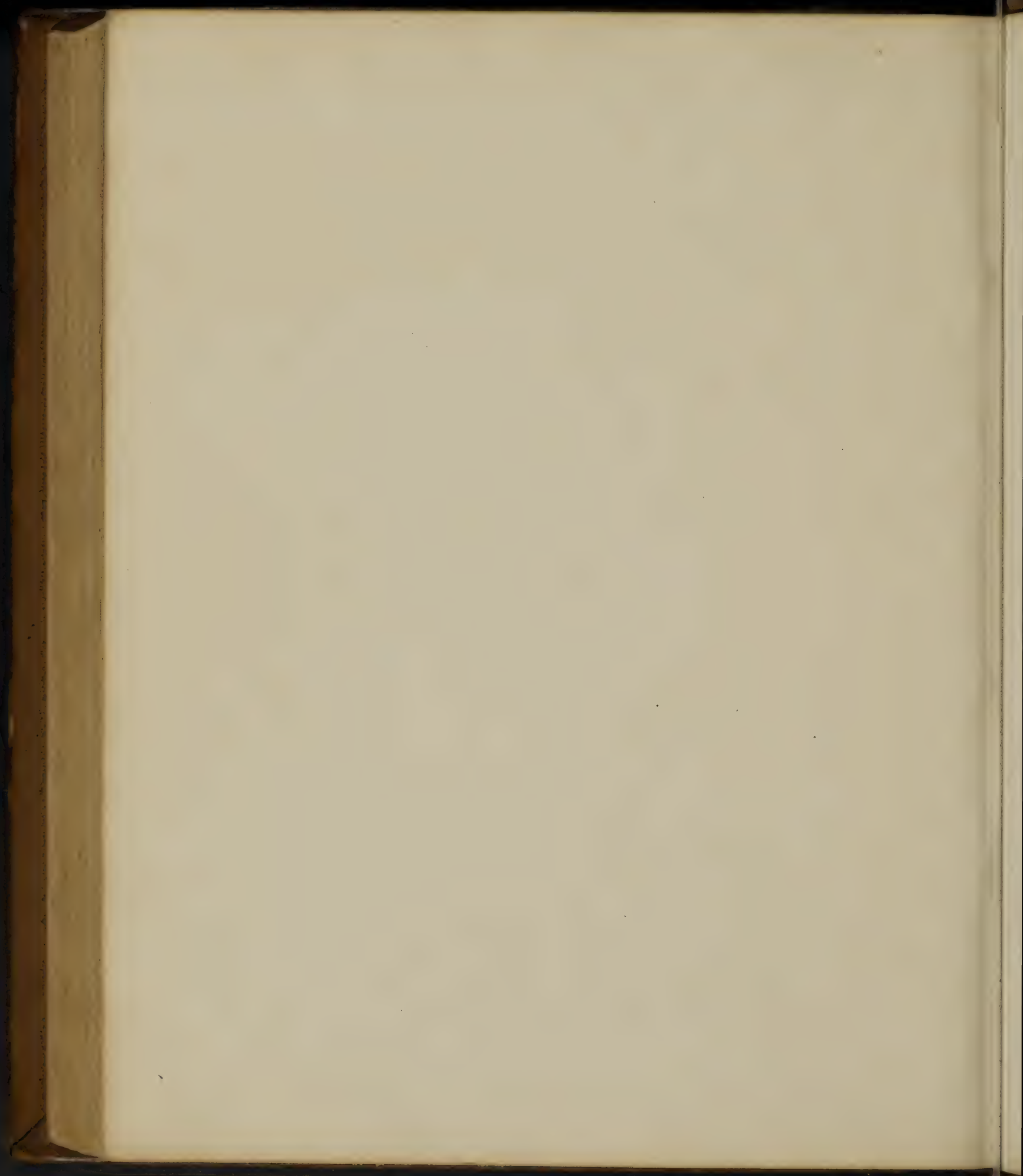


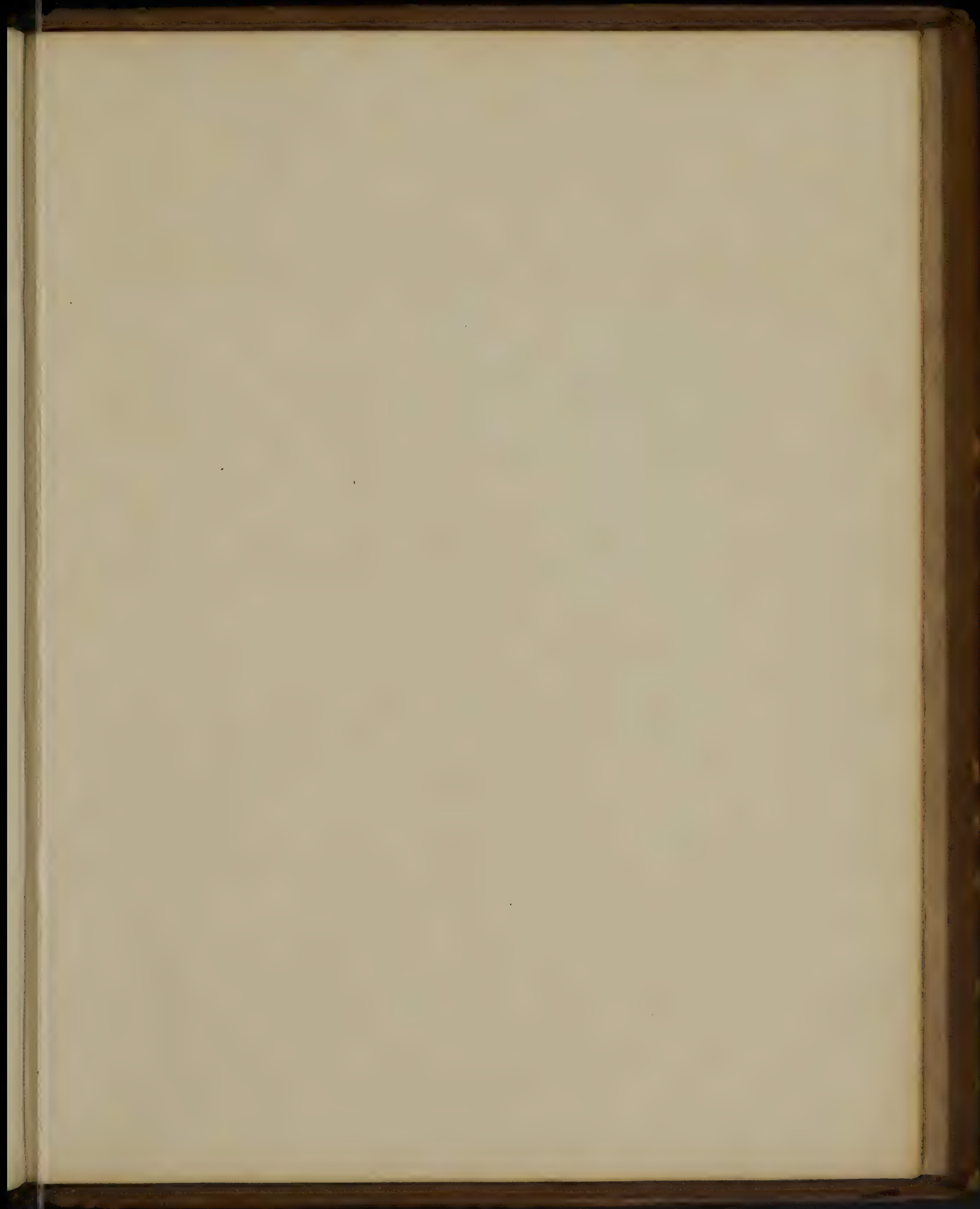


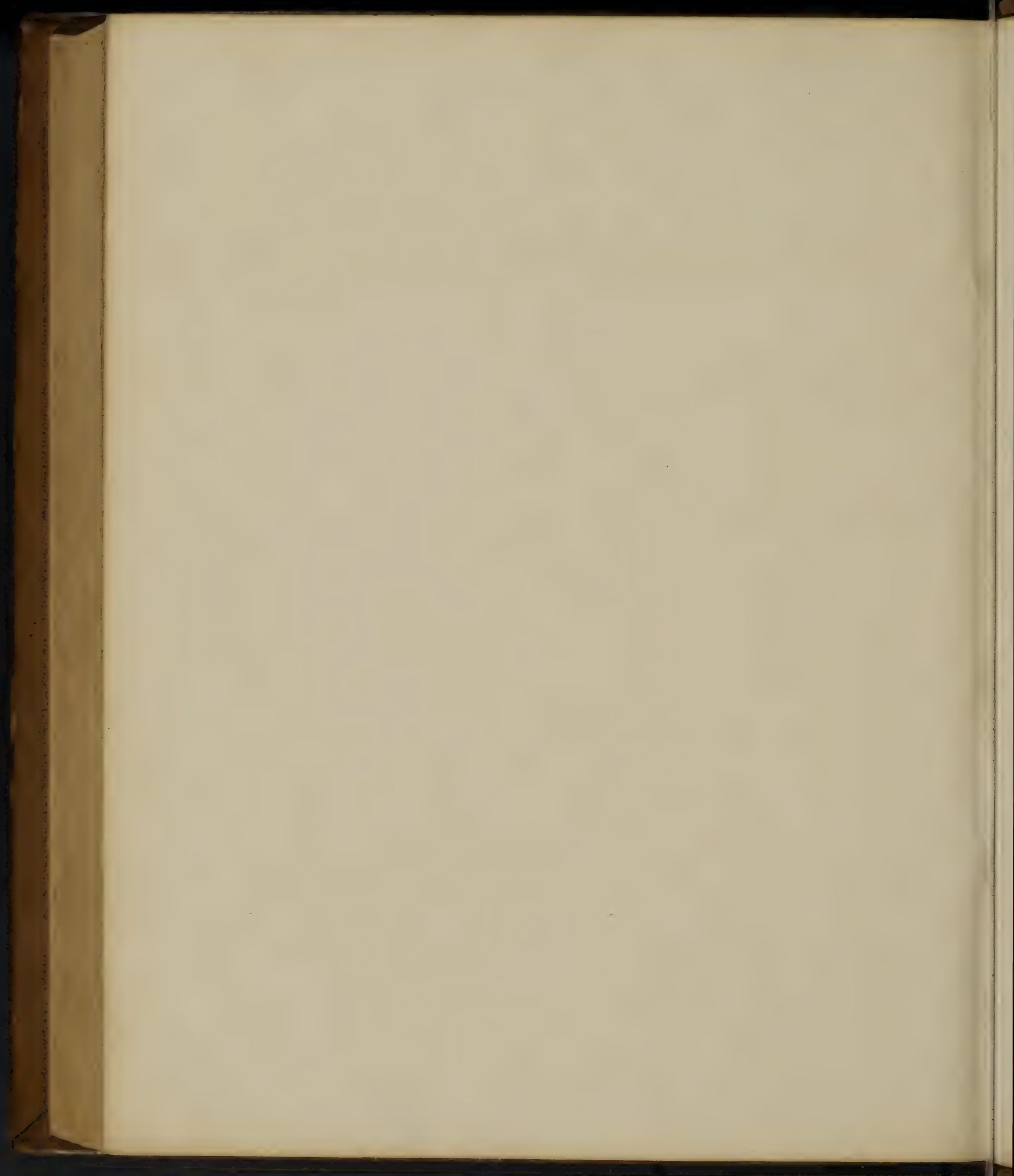


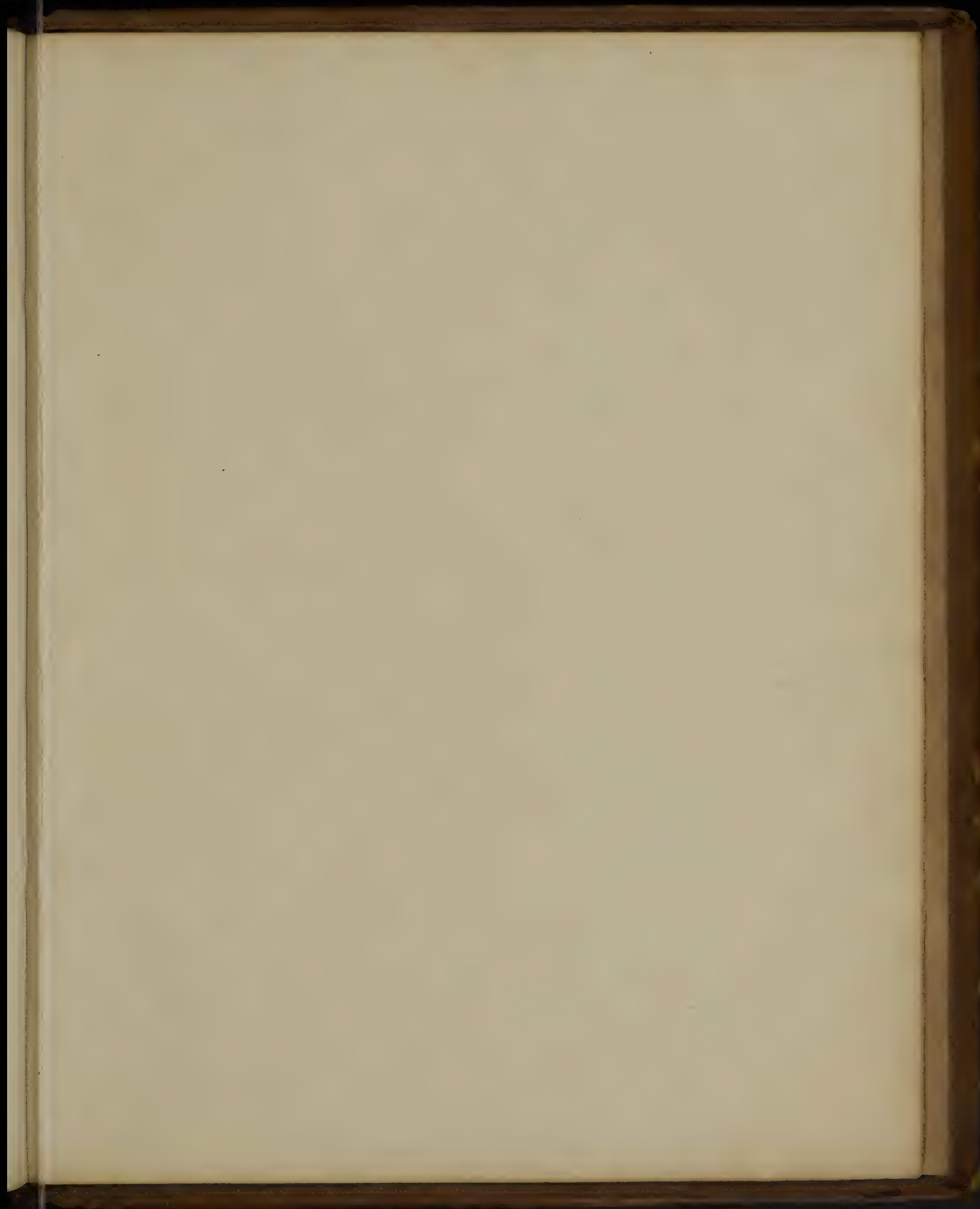


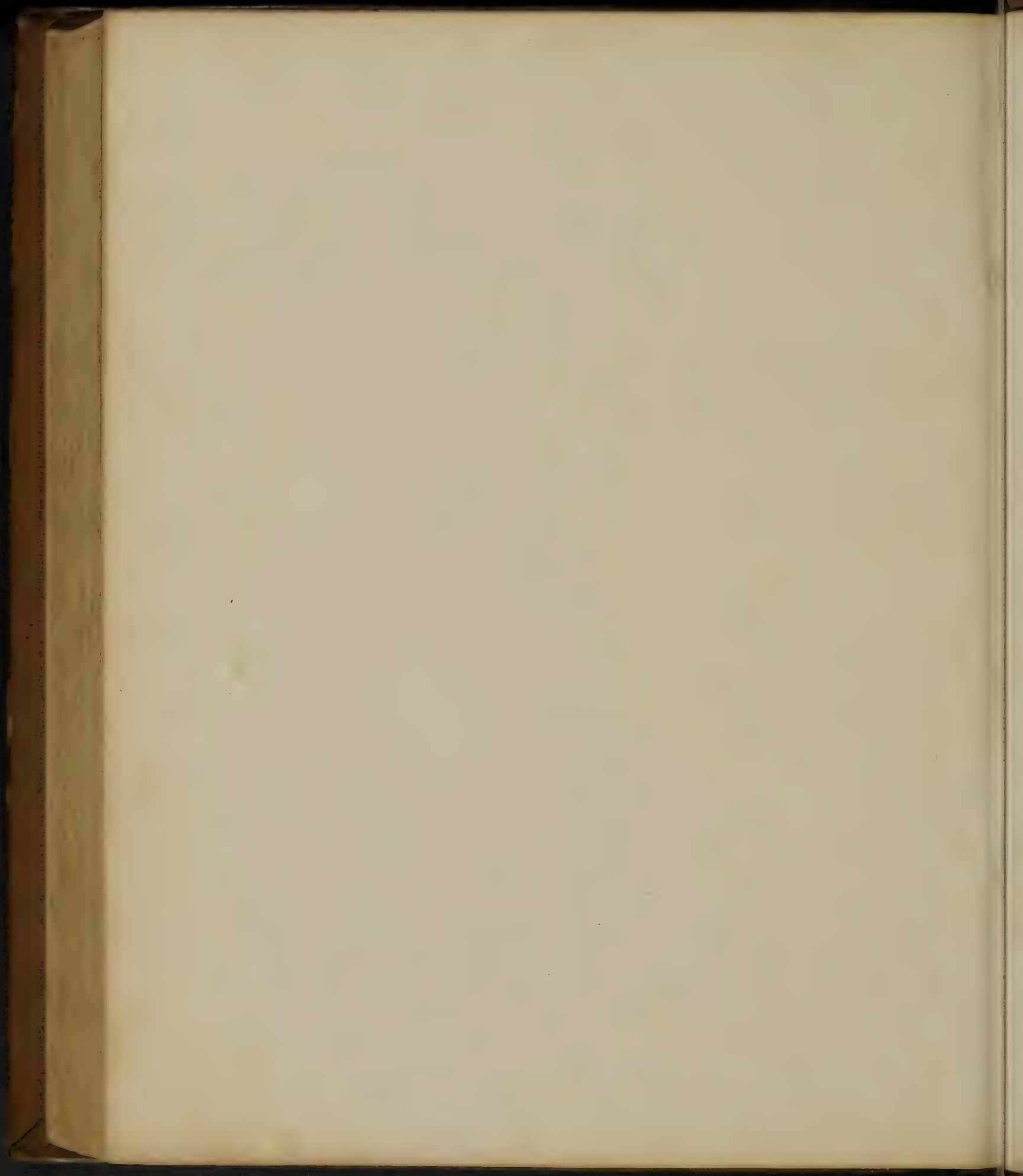


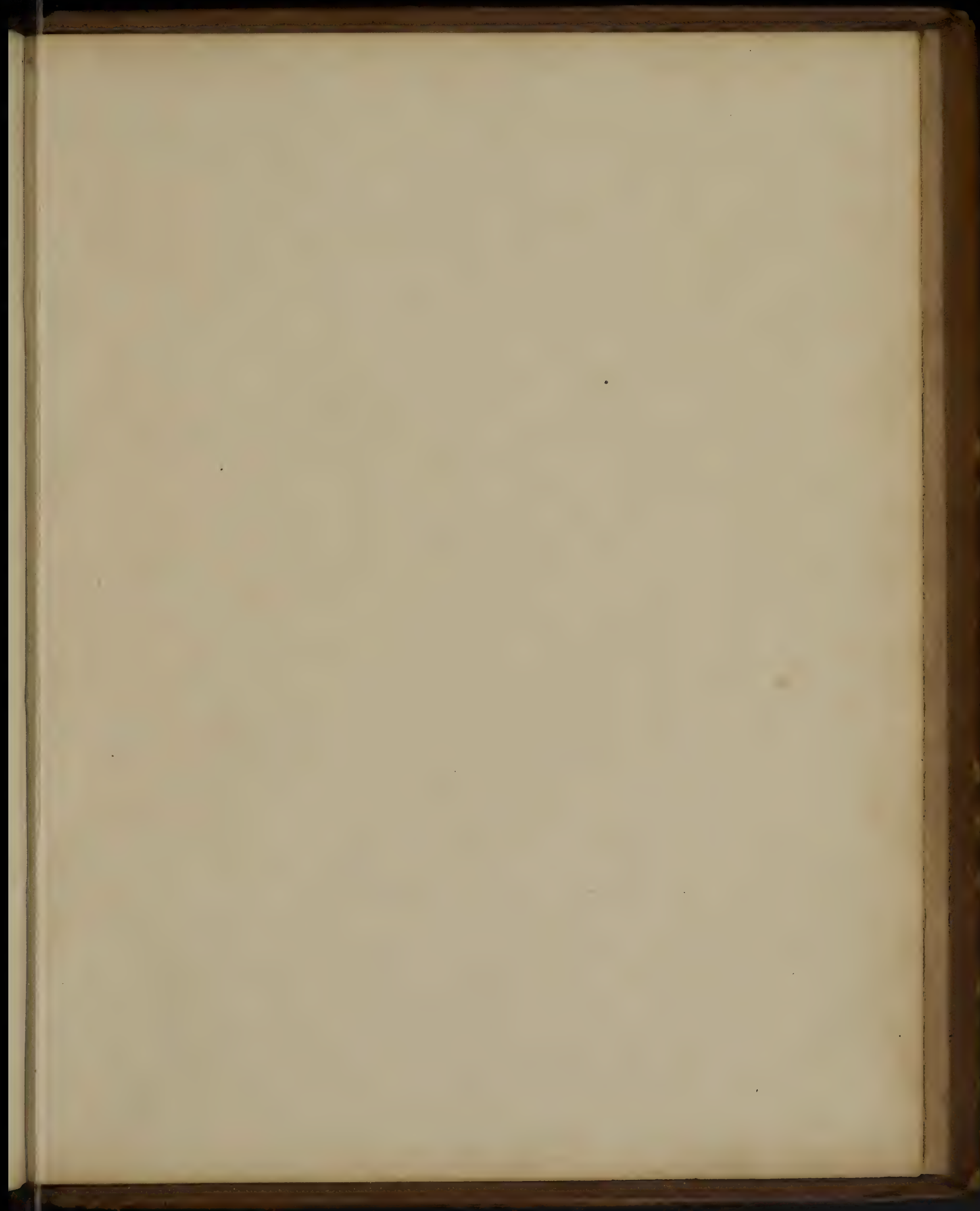


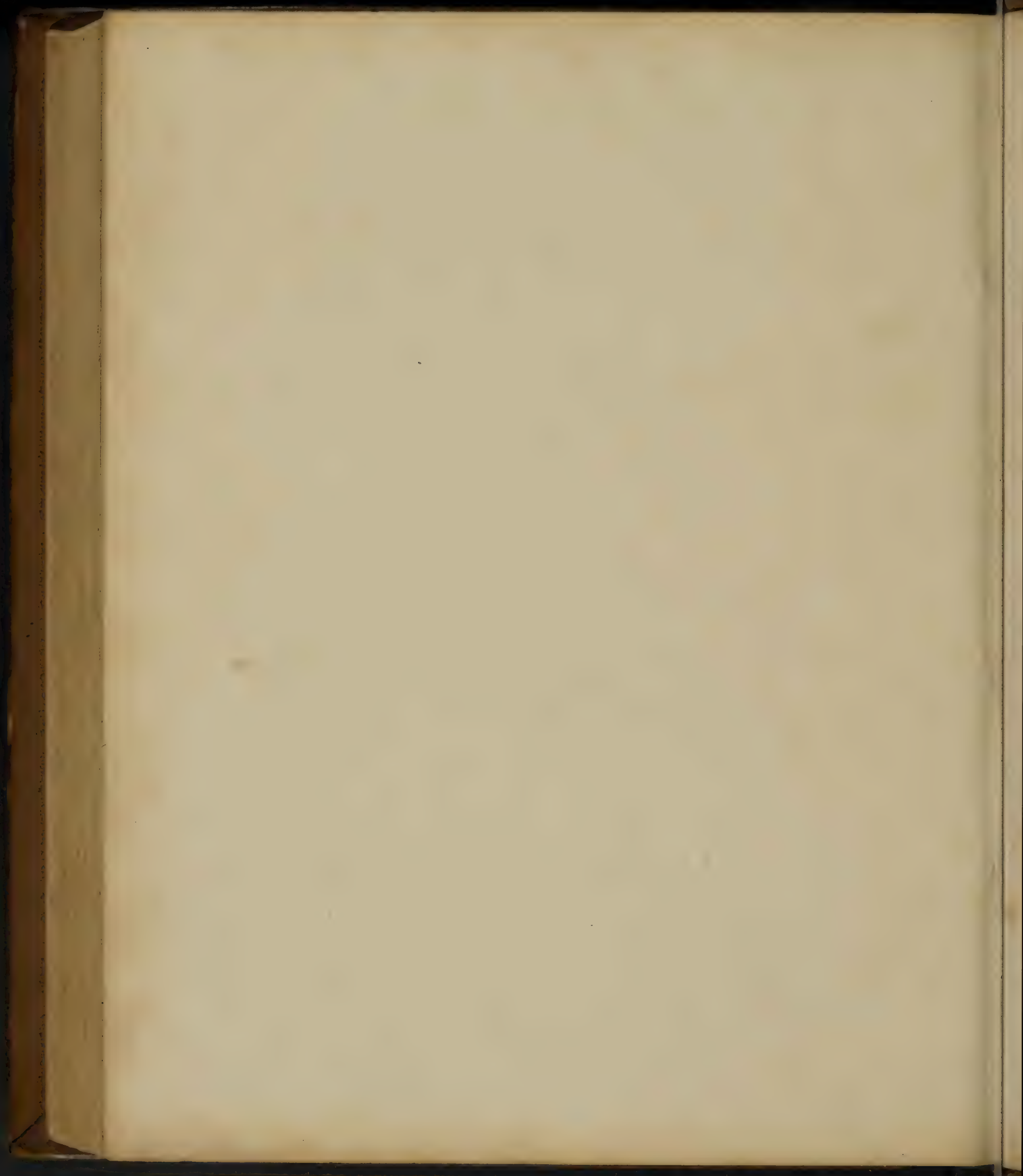


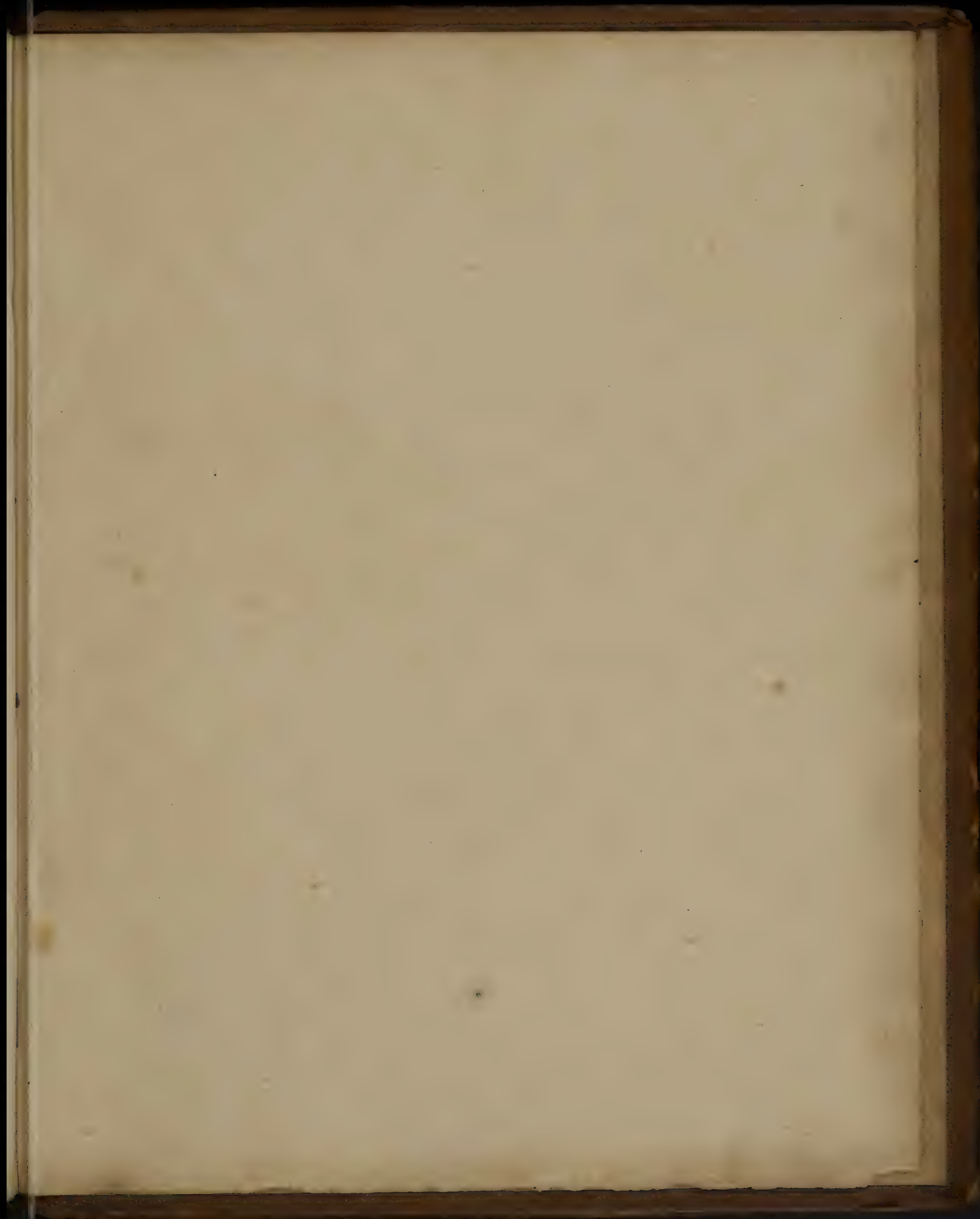


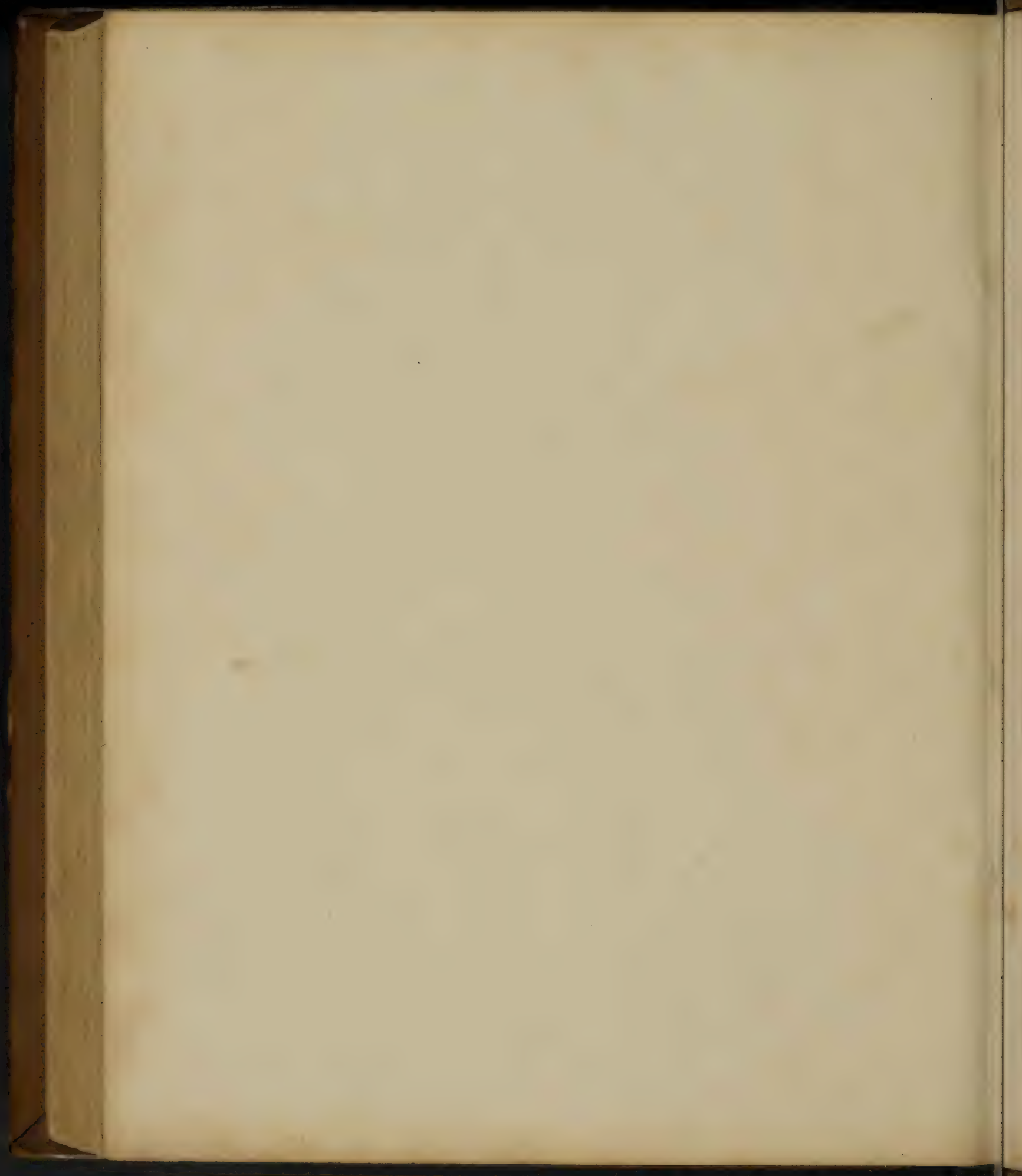


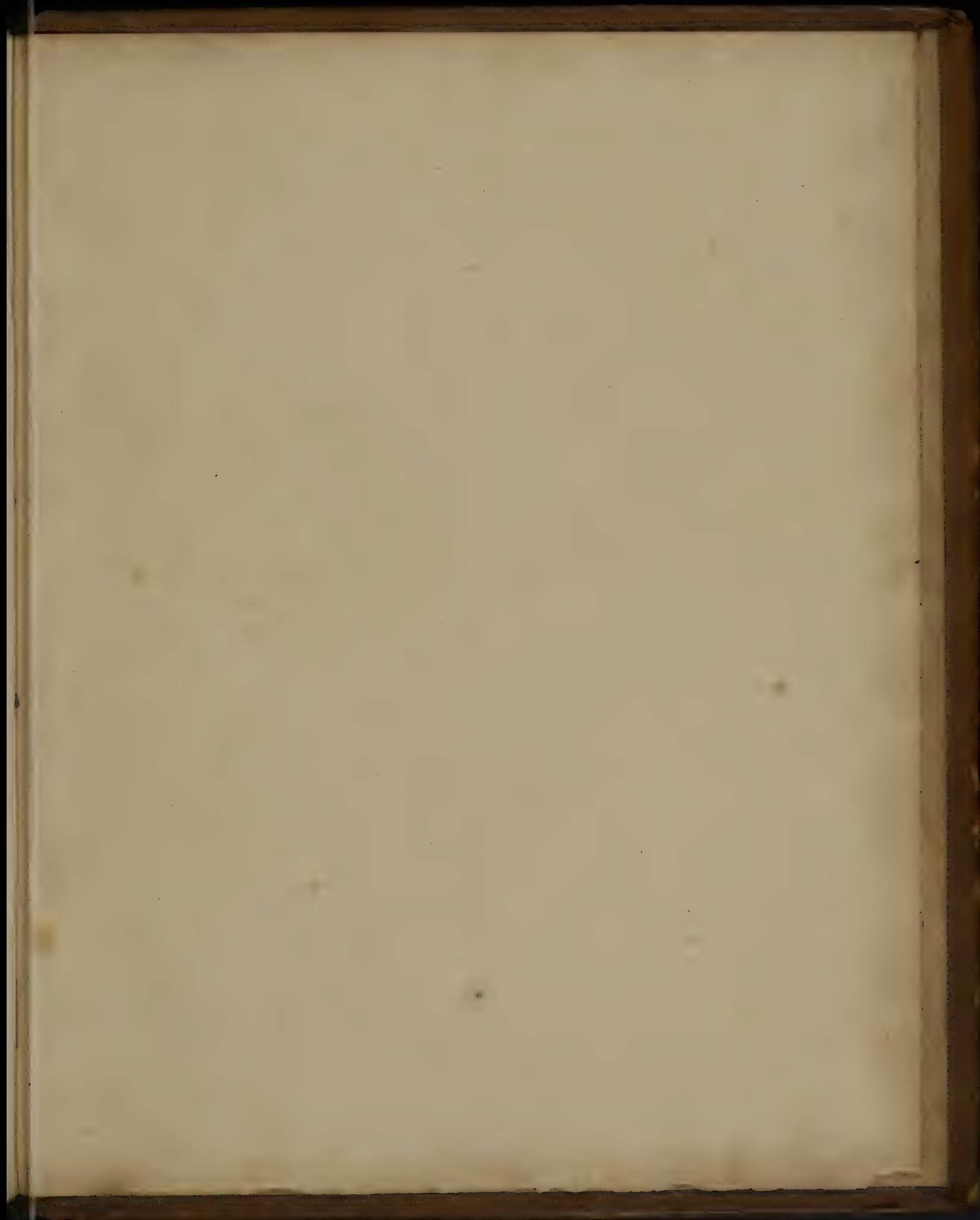


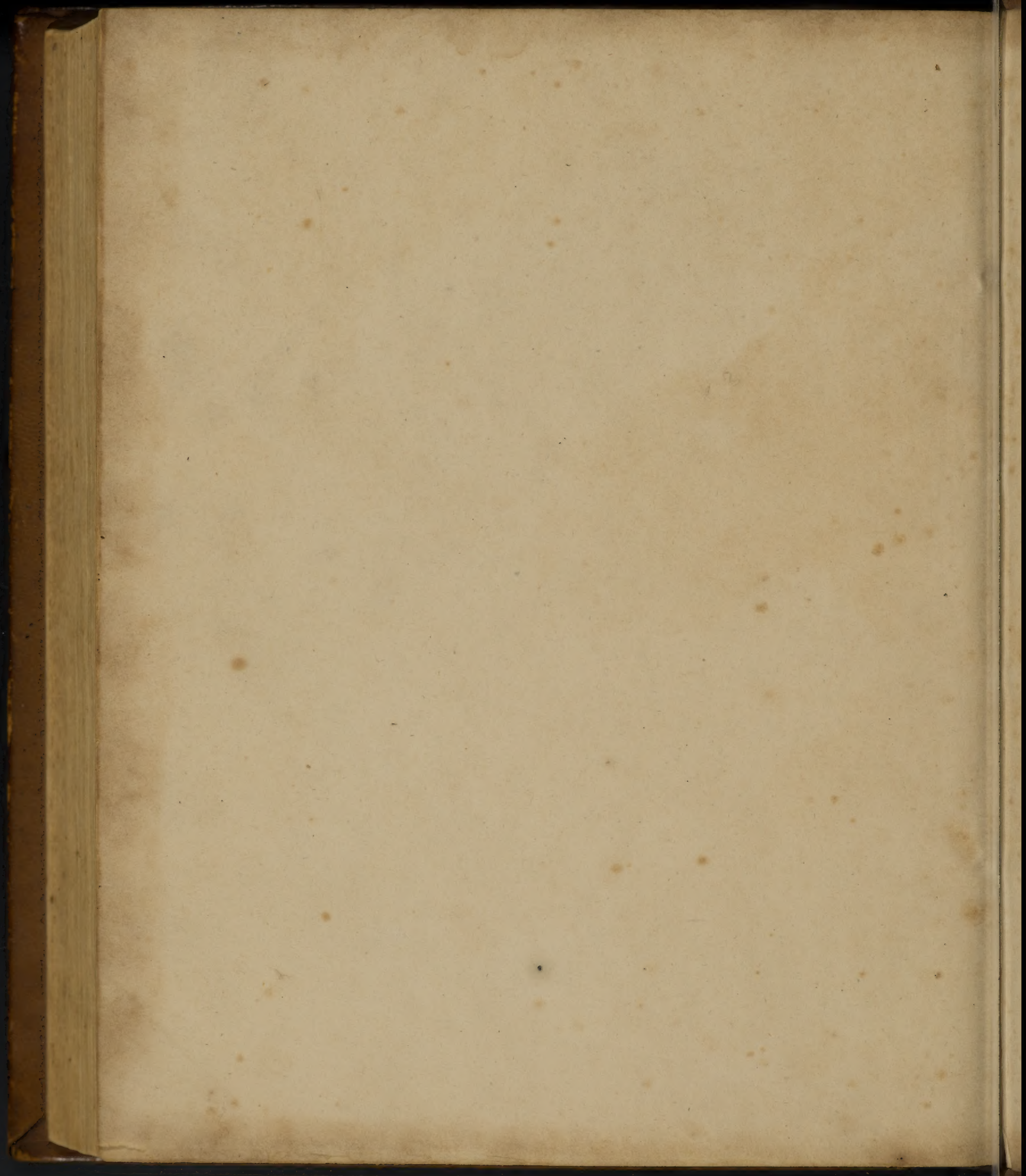


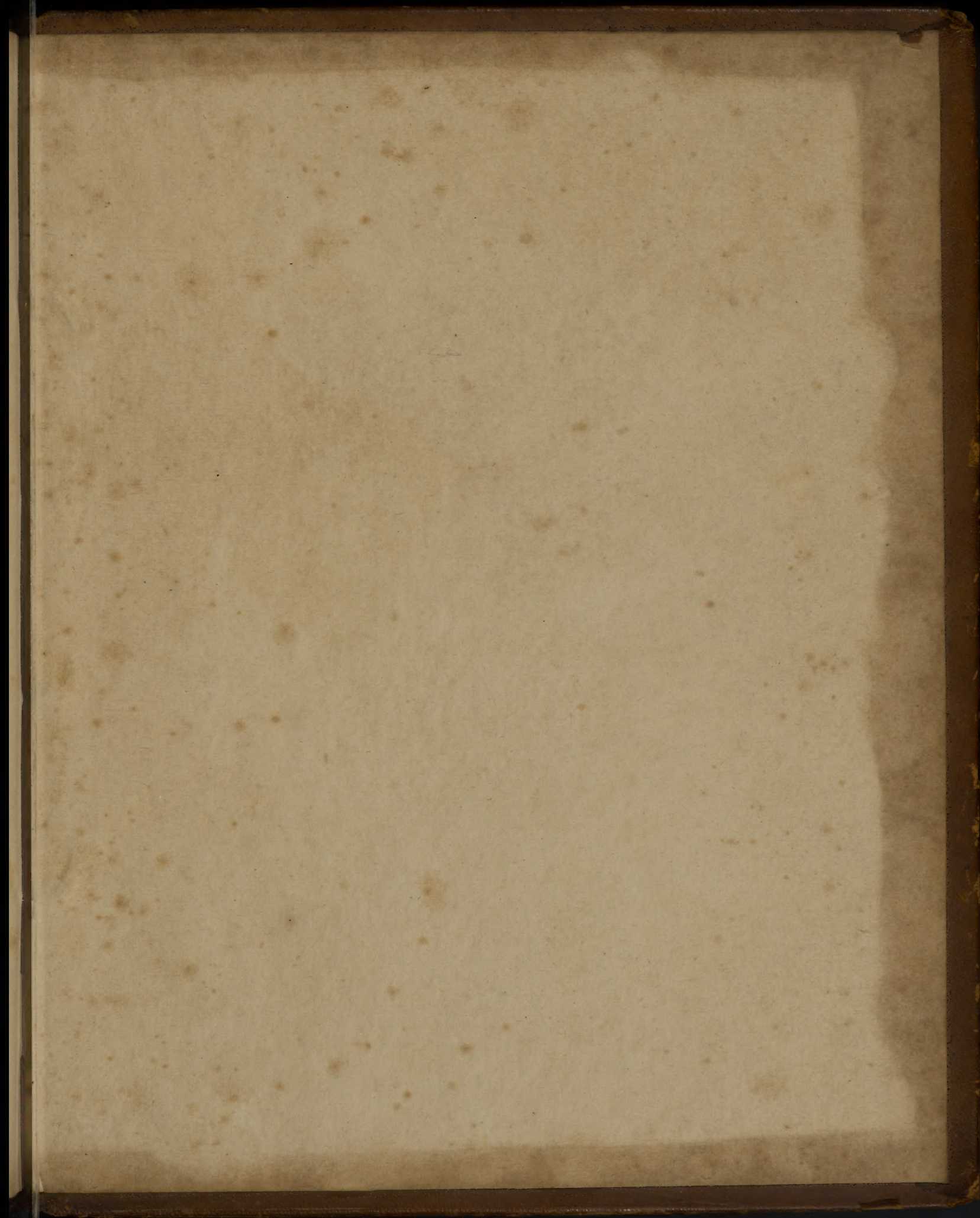


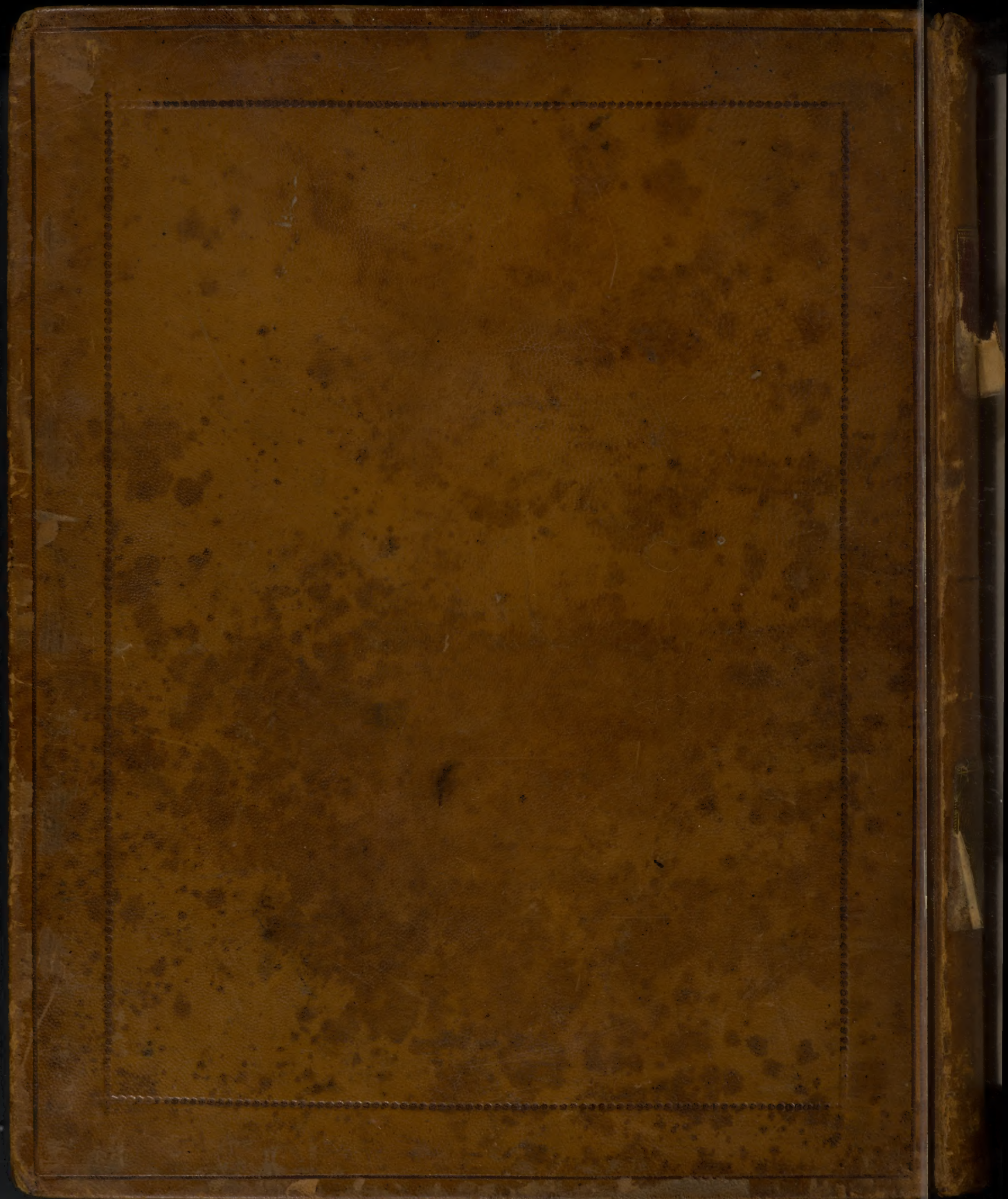












REEVES
&
GOULD'S
LECTURES.

VOL.
3
NUM.